IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1702

SOCIALIST WORKERS PARTY, ET AL.,

Petitioners,

—v.—

THE ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Socialist Workers Party, the Young Socialist Alliance, and the other plaintiffs[1] petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the court of appeals (App. A, 1a-25a)* is unreported. A prior opinion of the court of appeals, *In re United States* (App. C, 28a-38a) is reported at 565 F.2d 19 (2d Cir. 1977), *cert. denied*, 436 U.S. 962. The district court opinion (App. E, 107a-111a) is unreported; its prior opinion (App. D, 39a-106a) is reported at 458 F. Supp. 895 (S.D.N.Y. 1978).

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[1] The other plaintiffs named in the Second Amended Complaint are Jack Barnes, Barry Sheppard, Peter Camejo, Farrell Dobbs, Joseph Hansen, Willie Mae Reid, Linda Jenness, Andrew Pulley, Norman Oliver, Evelyn Sell, Morris Starsky and Charles Bolduc.

* References to "a" are to pages in the appendix to this petition, *infra*.

Jurisdiction

The judgment of the court of appeals (App. B, 26a-27a) is dated March 19, 1979 and was entered on April 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the court of appeals properly created a new ground for mandamus review of an interlocutory order concededly within the jurisdiction and authority of a district court and not involving novel or unresolved questions of law because it found that the underlying *case* is important and unusual and because the order held a cabinet officer in contempt of court?

2. Whether the court of appeals violated this Court's principles governing mandamus jurisdiction and abused its discretion by overruling a sanction of civil contempt specifically authorized by the Federal Rules of Civil Procedure, mandated by prior discovery in five years of litigation, and necessary to achieve compliance with a limited disclosure order previously upheld by the court of appeals as being within the discretion of the district court?

3. Whether the Attorney General of the United States has a preferred status over all other litigants, exempting him from a civil contempt sanction authorized by Rule 37(b)(2)(D) of the Federal Rules of Civil Procedure (F.R.Civ.P.) and applied by the district court to compel obedience to a pretrial discovery order previously upheld by the court of appeals, and entitling him to review of that order by mandamus?

4. Whether the court of appeals decision directing the district court to apply sanctions other than contempt deprived plaintiffs of their right under the due process clause to adduce evidence essential to prove their allegations, where the district court found that there could be no adequate substitute for actual production of the evidence?

Statute and Rules Involved

28 U.S.C. 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 37, F.R.Civ.P., provides in relevant part:

(b) *Failure to Comply with Order*

(2) *Sanctions by Court in Wnich Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated fact shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the

order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Statement

This case has been in active pre-trial litigation for six years. The complaint alleges that the defendants, including the Attorney General and the Director of the Federal Bureau of Investigation, attempted in a variety of ways—including the commission of illegal and tortious acts—to disrupt and ultimately to destroy the plaintiff organizations (A 2327-62).[2] The allegations were confirmed by pretrial discovery in this case,[3] and by congressional committee hearings and reports,[4] although the full extent of the FBI's actions against the plaintiffs, including use of informer activists,[5] remains to be established for the purpose of determining damages and formulating injunctive relief.

The discovery also proved that the defendants' intensive forty-year "investigation" of the plaintiff organizations—which generated files of eight million documents by defendant FBI alone—never uncovered any crimes by the plaintiffs, but, on the contrary, revealed that the plaintiffs engaged in totally lawful political activity.[6] That fact

[2] References to "A" are to pages in the appendix in the court of appeals.

[3] See the comments of the district court on this point (A 657-69, 130-32).

[4] See *Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities,* United States Senate, 94th Cong., 2d Sess. (1976), Book II, page 8, Book III, pages 17-18, and the *Investigative Report of the Select Committee on Intelligence,* United States House of Representatives, 94th Cong., 1st Sess. (1975), published by the *Village Voice,* February 16, 1976.

[5] This term is used because the informers were not only information gatherers but active paid agents of the FBI in the commission of tortious and criminal acts against the plaintiffs. *Infra,* 6-10.

[6] In 1941 SWP leaders were convicted under the "mere advocacy" section of the Smith Act, which was later invalidated in *Yates* v. *United States,* 354 U.S. 298; *Scales* v. *United States,* 367 U.S. 290; and *Noto* v. *United States,* 367 U.S. 290. Both the House and the Senate committees on surveillance concluded that the investigation of the SWP was unjustified:

> FBI's failure to uncover illegal activity by this political party is not from lack of effort. SWP has been subject to 34 years of intensive investigation . . . FBI officials did not mention the fact that the Socialist Workers are a legitimate American political party, that even runs a candidate for President. Equally as important, the FBI has found no evidence to support a federal prosecution of an SWP member, with the exception of several Smith Act violations in 1941. Since that time, not only have there been no further prosecutions against the SWP for any Federal offense, but the portions of the Smith Act under which those earlier convictions had been obtained have been declared unconstitutional.
>
> The investigation, which FBI officials tacitly admit has been conducted under the aegis of an unprosecutable statute, has

and attendant public criticism led the Attorney General in late 1976 to announce publicly that he had directed the FBI to terminate the investigation of the plaintiff organizations (42a-43a).

The most pervasive and perhaps most injurious form of FBI operation against plaintiffs was the infiltration of the Socialist Workers Party (SWP) and the Young Socialist Alliance (YSA) by hundreds of paid informers. Plaintiffs allege—and the evidence obtained so far confirms—that these informers were not mere passive reporters of information (A 564-65). They were offensive weapons in an FBI program incredibly and accurately entitled "SWP Disruption Program." The informers were paid to attempt to disrupt, divide and destroy the plaintiff organizations and to interfere with plaintiffs' relationships with other

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revealed that the SWP is a highly law-abiding group. The SWP has even avoided illegal and potentially violent confrontations with the authorities during any sort of civil protest. Nevertheless, this has had no apparent impact on 34 years of unproductive spying.

Excerpts from the *Investigative Report of the Select Committee on Intelligence*, United States House of Representatives, 94th Cong., 1st Sess. (1975) (Pike Committee), reprinted in the *Village Voice*, February 16, 1976.

> [T]he FBI has admitted that the Socialist Workers Party has committed no criminal acts. Yet the Bureau has investigated the Socialist Workers Party for more than three decades on the basis of its revolutionary rhetoric—which the FBI concedes falls short of incitement to violence—and its claimed international links. The Bureau is currently using its informants to collect information about SWP members' political views, including those on "U.S. involvement in Angola," "food prices," "racial matters," "the Vietnam War," and about their efforts to support non-SWP candidates for political office.

Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, 94th Cong., 2d Sess. (1976), Book II, page 8 (Church Committee).

lawful organizations.[7] Informers also engaged in such criminal and tortious activities as burglarizing plaintiffs' offices and homes, and otherwise purloining documents for delivery to the FBI (A 144-45).

In short, for almost the entire period of their existence, plaintiff organizations have been subject to the disruptive efforts of those purported members whose real loyalty lay with the FBI.

Plaintiffs' efforts to discover the nature and extent of the informers' illegal activities were attempted in the first instance through interrogatories propounded to the FBI. The interrogatory answers initially supplied by the FBI in June 1976 proved to be incorrect, incomplete and deliberately false (A 612-30). Further "supplementary" answers, supplied after the *plaintiffs'* discovery of significant inaccuracies in the original answers, also proved to be inaccurate or incomplete (A 141, 434-35, 614).

The files of seven informers, whose identities independently had become known to the plaintiffs,[8] were produced

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[7] For example, one FBI documents states:

> LA sources [informers] have been instructed to favor the majority position and to attempt to keep the Swabeck-Liang group from withdrawing from the LAL-SWP [Los Angeles local of the SWP] and where possible, without compromising themselves, to keep the Swabeck-Liang group versus the majority group turmoil at its highest possible peak.

In the same memo, informers are instructed to campaign for election to the local SWP's executive committee so as to be in a better position to engage in "fanning the flames" of this dispute (A 3124, 3127).

[8] The first of these files was produced when a routine burglary arrest of one Timothy Redfearn by local police authorities in Denver led to the public identification of Redfearn as an FBI informer posing as a member of the YSA. His file, which was ordered disclosed over FBI objections, revealed that he had burglarized the offices of the SWP and the YSA and the homes of their members for the FBI even during the present litigation; it also exposed the falsity of the defendant FBI's interrogatory answers in this litigation relating to him (A 732, 138).

in the fall of 1976. These seven files supplied neither a representative nor a comprehensive picture of the activities of the 1300 informers in question (A 733, 143).

Therefore, on August 3, 1976, plaintiffs applied for an order directing the FBI to produce the files of 19 informers selected by plaintiffs from among the 1300 informers identified by code number in the FBI's answers to interrogatories. The 19 were selected to obtain a representative sample of informers who played either important or typical roles with respect to the SWP and YSA.

The defendants made a blanket claim of informer privilege as to the files without reference to the particular documents ostensibly covered by the claim, by affidavit of the FBI official in charge of investigations. The defendants did not claim the files contained state, military, diplomatic or national security secrets, and accordingly, they did not resist producing the files to the judge and his clerks *in camera*. *Compare United States* v. *Reynolds*, 345 U.S. 1.

The government insisted that its informers rely on a pledge of confidentiality given to them by the FBI in return for their agreement to act as informers. Plaintiffs' discovery of the FBI demonstrated, however, that no such pledge exists. On the contrary, the government's policy is to instruct informers that they may be required by court order to testify.[9]

[9] The FBI Manual of Instruction provides (A 1029):

> 13. Preparation for testifying. Contacting Agent must condition informant for fact that he may at future day be called upon to testify to information that he has furnished on security matters. Proper indoctrination of the informant is essential as Bureau must provide witnesses whenever Department initiates prosecution in security cases.

Another FBI document furnishes the following statement of Bureau policy on informer confidentiality in the domestic security field, with unambiguous directions to the heads of field offices as to what security informers are to be told on the subject:

> I wish to reiterate existing instructions that it is the responsibility of the Special Agents handling security informants to condition them to the fact that someday the knowledge they possess may be needed as evidence in court or at another hearing to assist our Government in combating the evils of subversion. . . . The proper indoctrination of informants in this regard is absolutely essential, since it is incumbent upon the Bureau to make informants available whenever the Department initiates prosecution in security cases. . . . As a general rule, *all of our security informants are considered available* for interview by Department Attorneys and for testimony if needed. Only a very few are furnishing information of such a highly sensitive and important nature as to preclude their use.

SAC letter 68-14, 2/20/68 (emphasis supplied) (A 1036-1037).

James P. Adams, then head of FBI investigations, testified at length before the district court that no promise of confidentiality was or could be given to informers (A 1018-26). *And see Crain* v. *Krehbiel*, 443 F. Supp. 202, 205-06 (N.D. Cal. 1977).

Of course, even had there been a "pledge of confidentiality," "no pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice", 8 J. Wigmore, *Evidence* § 2286 (McNaughton rev. 1961), quoted with approval in *Branzburg* v. *Hayes*, 408 U.S. 665, 682 n.21.

The district judge reviewed the 19 files, relying in part on summaries prepared by the FBI at his request because the files, 25 drawers of material, were so voluminous. In an order and opinion issued on May 31, 1977, the district court concluded that the informers had "provided the FBI with a consistent recital" of "peaceful, lawful, political activities, peaceful, lawful personal activities and a total absence of any criminal activities or plans of any nature whatever" on the part of the plaintiffs, raising "a very serious question about whether there could be any justification for this exceedingly close surveillance after this kind of record had been developed for a period of a number of years; that is, the surveillance with absolutely no indication of violent or criminal activity" by plaintiffs (A 631).

The district judge found, based upon his thorough and careful review, that the informer files contain extensive evidence of the kind of informer activity which plaintiffs

contend to be unlawful and that the files "undoubtedly constitute the most important body of evidence in this case" (A225-26), but that it was his duty as trial judge to minimize public disclosure. To this end, he required the assistance of plaintiffs' counsel in selecting the smallest possible number of files to be disclosed publicly in order to try plaintiffs' claims (A692-93). He therefore ordered the disclosure of 18 files[10] to plaintiffs' counsel under a strict protective order which even precluded disclosure to the plaintiffs. The district judge concluded that the restricted production to plaintiffs' counsel "involves no interference—or a negligible interference—with legitimate law enforcement and other interests sought to be protected by the FBI and other government agencies" (A 225; and see also A 463-65).

The defendants appealed the order of May 31, 1977, and sought mandamus. On October 11, 1977, the court of appeals (Van Graafeiland, Webster and Dooling, JJ.) denied the defendants' petition for mandamus and for review under 28 U.S.C. §1291. *In re United States,* 565 F.2d 19 (28a-38a). The court enumerated the standards for interlocutory review of a pre-trial discovery order, analyzed the case in light of those standards, and found that it met none of them. The court, citing *Roviaro* v. *United States,* 353 U.S. 53, held that the informer privilege was not absolute, and that the district court must determine whether "the identification of an informer or the production of his communication is essential to a fair determination of the issues in the case"; if it is, then "the privilege cannot be invoked" (33a-34a). The court of appeals further concluded that "it is by now well-established that a district judge, in the exercise of his discretion . . . may permit opposing counsel to participate in and assist him

[10] The government agreed to produce the nineteenth file, stating that the informer's identity had become known. The file turned out to be useless because the FBI had made massive deletions.

in the conduct of *in camera* proceedings under a pledge of secrecy" (35a), and specifically held that the district judge had not abused that discretion in the present case (35a-36a).

On March 9, 1978 the court of appeals denied the defendants' petition for rehearing and suggestion for hearing *en banc;* no active judge in the circuit voted for rehearing (A 105). This Court denied the defendants' petition for a writ of certiorari, the Chief Justice and Justices White and Powell dissenting. *Bell* v. *Socialist Workers Party,* 436 U.S. 962.

On June 13, 1978, the district judge held a hearing to inquire as to the defendants' compliance with the discovery order. The defendant Attorney General filed an affidavit stating that the decision as to whether the defendants would comply with the order was his, and that he had decided not to obey the order (A 415).

Plaintiffs then moved under F.R.Civ.P. 37(b) (2) (D) to adjudge the Attorney General in civil contempt to compel his obedience. The defendants opposed the motion, arguing that they had the "option" to "accept" what they termed issue-related sanctions rather than obey the court's order (A 301, 302), although they admitted that the decision as to which sanction to impose was "obviously" ultimately for the district court (A 304).

On June 30, 1978, the district judge issued his opinion and order (39a-82a). He reiterated in the strongest possible terms his factual findings, based upon a thorough review of the record and the files, "that the FBI informant files constitute a unique and essential body of evidence regarding the allegations of wrongdoing in this case" (43a).

The district judge considered and rejected the defendants' proposed "sanctions" noting that, in fact, "in the context of the history of this case, they are not sanctions in any sense" (75a). He also considered the possibility

of applying other "issue-related" sanctions under Rule 37, but found that it is "an essential *threshold requirement*," *ibid.* (emphasis in original), that plaintiffs' counsel have meaningful access to the information in the informer files in order to be able "to develop the full nature of the wrongdoings and damages, and to rebut Government defense evidence" (79a).

> It was and is the Court's further conclusion that this evidence is so basic and essential that no major issue in the case—whether relating to injunctive relief, claims for damages, or jurisdictional defenses, can be resolved without developing a factual record with evidence from these files.

76a.

The district judge rejected the defendants' suggestion that plaintiffs go ahead with the information already available to them and with the few files the government was willing to produce in censored form (based upon the "consent" of four informers), finding that:

> [t]his is simply a renewed effort to whittle down plaintiffs' already modest, compromise request for documents. The files which the Government is willing to produce do not constitute a fair selection. They do not cover the range of locations and activities embraced in the total number of files ordered to be produced by the Court.

80a.

Finally, the district judge concluded that:

> [i]n the present action there is, in the considered opinion of the Court, no workable alternative to full enforcement of the Court's order through contempt.

82a.

The court's order gave the Attorney General notice that unless he complied with the order by 5:00 p.m., July 7, 1978 he would automatically be in civil contempt thereafter. At the same time, the court denied plaintiffs' application for an order directing the imprisonment of the Attorney General, without prejudice to the making of a renewed motion for specific sanctions. *Ibid.*

On July 6, 1978 the defendants applied to the district judge for a stay of the June 30, 1978 order, submitting a second affidavit from the Attorney General stating that he would not obey that order to produce the files *in camera* to plaintiffs' lawyers by July 7, 1978, and that he would continue to disobey the order until "after full appellate review" (A 260-65).

Thereupon the district judge, more than a year after entering his discovery order, adjudged the Attorney General in civil contempt, without ordering the imposition of any more specific sanction (107a-111a).

The defendants appealed to the court of appeals under 28 U.S.C. 1291 and sought mandamus under 28 U.S.C. 1651(a). The court of appeals (Lumbard, Oakes and Friendly, JJ.) dismissed the appeal (5a-8a), rejecting the defendants' claim "that the contempt order is appealable as a collateral order, as a third party contempt or as an exceptional order implicating the constitutional separation of powers" (5a).

Adopting the arguments made by the plaintiffs in opposing the Attorney General's petition for certiorari in *Bell* v. *Socialist Workers Party*, 436 U.S. 962, Respondent's Brief in Opposition at 9-11, the court of appeals readily distinguished the Attorney General's reliance upon the president's procedural prerogatives in *United States* v. *Nixon*, 418 U.S. 683, pointing out that "the executive responsibilities and constitutional status of the Attorney General do not compare to those of the President" (8a).

The court of appeals nevertheless decided to review the contempt order by issuing a writ of mandamus under 28 U.S.C. 1651(a). It "commence[d] with the ready acknowledgment that only the truly exceptional case warrants this exercise of supervisory control" (9a). It found the case "exceptional" (13a), and "extraordinary" (11a), because (1) it is "the first case brought by a political party against the Government itself for damages as well as injunctive relief for allegedly illegal surveillance of the party," *ibid.;* (2) it "involves a claim of privilege on behalf of an unprecedented number of informants" *ibid.;* and (3) "the order for which review is sought adjudged the Attorney General of the United States in civil contempt" (12a). On this third ground, the court of appeals stated:

> Although we unequivocally affirm the principle that no person is above the law, and although we do not find petitioner's status as chief law enforcement officer sufficient to permit appeal under the *Nixon* exception, we cannot ignore the fact that a contempt sanction imposed on the Attorney General in his official capacity has greater public importance, with separation of power overtones, and warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant.

Ibid.

Turning to the merits, the court of appeals declined "to examine the underlying disclosure order" (20a). It vacated the contempt order, however, because the Attorney General:

> is the principal attorney for another branch of government co-equal to the judicial branch in constitutional function and design. Courts accordingly owe him respect as an official and, absent an abuse of power or misuse of office, the most careful and reasoned treatment as party or as litigant. Thus, holding the Attorney General of the United States in contempt to assure compliance with a court order should be a

> last resort, to be taken only after all other means to achieve the ends legitimately sought by the court have been exhausted.

14a.

The court of appeals went on to state that it had reviewed the file summaries prepared by the FBI (and never disclosed to plaintiffs), although evidently the court did not review the actual files (17a). Without further explanation the court concluded that "it was clearly erroneous for the district court to determine that the files are so central to the plaintiffs' case that contempt is the only appropriate sanction for the Government's failure to disclose them." *Ibid.*

The court of appeals directed that the district court "impose those sanctions which, so far as possible, put plaintiffs in the position that they would have been if the Government had disclosed the information" (18a). It directed the district court to produce "a set of representative findings from the informant files for the benefit of the plaintiffs". *Ibid.*[11] While "this alternative might not itself be a sufficient sanction for the Government's non-compliance with the discovery order" it would "improve" the plaintiffs' "ability to prosecute the action without the files" and "to demonstrate what further sanctions, if any, are appropriate". *Ibid.*

The court of appeals noted that the Federal Rules of Civil Procedure "permit many sanctions other than contempt" (14a), including the possibility that the district court might treat as "admitted those facts that the litigant would have had to prove by means of the evidence that the Government would have produced if it had complied with discovery" (16a, n.15).

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[11] The court stated that "[t]he findings can usually be based upon the summaries alone" except that "[i]f the summary's description of an important matter is too vague or incomplete . . . the district court or master may refer to the original informant file" (19a).

Reasons for Granting the Writ

1. The court of appeals decision creates an unprecedented ground for mandamus review, in total and open disregard of the limits upon mandamus jurisdiction established and emphasized by this Court. It sanctions appellate review of an interlocutory order concededly within the jurisdiction and power of a district court and not involving novel or unresolved questions of law merely because, in the view of the court of appeals, the underlying *case* is important or unusual, and because the order held a high government officer in contempt of court. If allowed to stand, the court of appeals decision thus will seriously undermine two fundamental principles of this Court's jurisprudence: the final judgment rule and, even more important, the rule of equality under the law.

In recent years, the Court has given renewed emphasis to the principle that the "remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr* v. *United States District Court*, 426 U.S. 394, 402. See also *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655; *Will* v. *United States*, 389 U.S. 90, 95; *Ex parte Fahey*, 332 U.S. 258, 260. It is not to be used merely to correct an erroneous ruling by the district court. *Schlagenhauf* v. *Holder*, 379 U.S. 104, 112; *Parr* v. *United States*, 351 U.S. 513, 520. Rather:

> [t]he writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" . . . And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes "jurisdiction," . . . the fact still remains that only "exceptional circumstances amounting to a judicial 'usurpation of power' will justify invocation of this extraordinary remedy."

Kerr, 426 U.S. at 402 (citations omitted).

Elsewhere, the Court has defined the "special circumstances" constituting a "usurpation of power" as limited to action "so palpably improper" as to place it beyond the scope of the authority conferred on the district courts by the Federal Rules of Civil Procedure, *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 256; "an abdication of the judicial function," *id.*; or a "clear abuse of discretion." *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383.

In *Will* v. *Calvert Fire Ins. Co.*, 433 U.S. at 665 n.7, at least a plurality of the Court cautioned "against the dangers" of invoking the "abuse of discretion" rationale as a basis for mandamus jurisdiction, echoing Chief Justice Warren's warning on behalf of the Court in the first *Will* case:

> Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power" into interlocutory review of nonappealable orders on the mere ground that they may be erroneous.

Will v. *United States*, 389 U.S. at 98 n.6.

To guard against such dangers, the Court has required that, in order to obtain mandamus, the moving party must satisfy "the burden of showing that its right to issuance of the writ is 'clear and indisputable.'" *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. at 662, quoting from *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. at 384. Thus in *Will*, the Court reversed a mandamus order on a matter committed to the discretion of the district court, holding that on such a question even if the district court exercised its discretion erroneously, "it cannot be said that a litigant's right to a particular result is 'clear and undisputable.'" 437 U.S. at 666.

None of the conditions for issuance of the writ justified the exercise of mandamus jurisdiction on the defendants' second application any more than on their first. The rules

of discovery, of course, apply to the government as litigant and sanctions are imposed when it fails to comply with discovery orders. *United States* v. *Procter & Gamble,* 356 U.S. 657; 4 *Moore's Federal Practice* ¶26.61 [6-11], at 26-298 (2d ed. 1976). Since the court of appeals itself held in its earlier opinion that the pretrial disclosure order was within the discretion of the district court and thus was not subject to review by mandamus, the district court had power to enforce the order by appropriate sanctions. *Britt* v. *Corporacion Peruana de Vapores,* 506 F.2d 927, 932 (5th Cir. 1975). Rule 37(b) of the Federal Rules of Civil Procedure sets forth the sanctions which the district court may impose. Contempt is specifically authorized by subsection (2), and it is appropriate where the objective is to compel compliance. *Penfield Co.* v. *Securities & Exchange Commission,* 330 U.S. 585, 592. As even the government conceded before the district court (A. 305), the choice of sanctions under Rule 37 is clearly committed to the discretion of the district court, *Kropp* v. *Ziebarth,* 557 F.2d 142, 146 (8th Cir. 1977); the government thus has no right to insist upon the use of one sanction as opposed to another. *Local Union No. 251* v. *Town Line Sand & Gravel, Inc.,* 511 F.2d 1198, 1199 (1st Cir. 1975). Accordingly, the district court's choice of sanctions under Rule 37 cannot be reviewed by mandamus, because the government cannot show "that its right to issuance of the writ is clear and indisputable." *Will* v. *Calvert Fire Ins. Co.,* 437 U.S. at 662.

The court of appeals did not even purport to rest its exercise of mandamus jurisdiction upon a finding that the district court acted beyond its jurisdiction or the limits of its discretionary authority to impose sanctions. It openly declined to follow the admonition in Mr. Justice Rehnquist's opinion in the second *Will* case that the party seeking mandamus must show a "clear and indisputable right" to the writ, on the ground that the opinion had the support of only a plurality of the Court (9a). The court of appeals

chose to ignore the fact that the admonition originally appeared in the *Bankers Life* opinion, 346 U.S. at 384, and that the *Will* plurality opinion merely quoted the relevant passage. *See also Kerr* v. *United States District Court,* 426 U.S. at 403.

Instead, the court of appeals issued mandamus because it found that this was an "extraordinary" case in three respects: it is the first case (of which it is aware) brought by a political party against the government for damages; it involves a claim of informer privilege;[12] and the central point, the contemnor defendant held the office of Attorney General (11a-12a).

The court thus created a new, and improper, basis for mandamus jurisdiction. No case in this court or any other court has upheld the use of mandamus merely because, in the view of the appellate court, the *case* is unusual, important, or extraordinary. It is true that in *United States* v. *United States District Court,* 444 F.2d 651 (6th Cir. 1971), *aff'd,* 407 U.S. 297, mandamus issued because of the existence of an unresolved and critically important *question of law. See also Schlagenhauf* v. *Holder,* 379 U.S. 104. But no such issue was raised by the present mandamus petition, and no such issue was addressed or decided by the court of appeals. The informer privilege question was disposed of by the court of appeals on the government's first mandamus petition, where the court refused mandamus because the issue was not novel or unresolved and the matter was within the district court's discretion (35a). And even the court of appeals does not claim that the Attorney General is immune as a matter of law from a contempt citation.

It is obvious that there was only one reason why the court of appeals chose to exercise mandamus jurisdiction in the instant case: because the contempt citation was

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[12] The court was incorrect in stating that the case "involves a claim of privilege on behalf of an unprecedented number of informants—over 1,300 according to the government's brief" (11a). In fact, it involves only eighteen informants (52a).

against the Attorney General. The court was quite explicit on this point, stating, "a contempt citation imposed upon the Attorney General in his official capacity . . .warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant" (12a). The decision thus elevates the Attorney General to a favored status as a litigant, free to disobey district court discovery orders and to escape the compulsion of a contempt adjudication.[13]

The decision below thus violates the fundamental principle that all litigants, including the government, stand equal before the courts. *Bank Line, Ltd.* v. *United States,* 163 F.2d 133, 138 (2d Cir. 1947); *Sawyer* v. *Dollar,* 190 F.2d 623, 633-34, 638-39 (D.C. Cir. 1951), *vacated as moot,* 344 U.S. 806. While the court below ritually recited the rule of equality under the law, even to the point of quoting Judge Augustus Hand's ringing declaration in *Bank Line,*[14] in fact it created a special rule for the Attorney General and presumably for other high government officers.[15] The

[13] It is clear that had the court of appeals not interfered with the pretrial process, the Attorney General would have complied with the district court's discovery order:

> If your Honors affirm the ruling, in whatever way you do it, and the Attorney General is in contempt of court, then faced with a choice of going to jail or turning over the files, he is obviously going to turn over the files.

Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, for the government on oral argument before the court of appeals, November 15, 1978. Transcript of proceedings at page 57.

[14] It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institutions.

163 F.2d at 138.

[15] The court below clouded the issue by referring to the Attorney General as "the principal attorney for another branch of government" (14a). The citation was *not* directed against the Attorney General as an attorney for a party, but as a defendant whose department is accused of both wrongdoing and an attempt to conceal the evidence of such wrongdoing.

effect of the decision thus will be to encourage high government officials to disobey lawful court orders, secure in the knowledge that it is quite unlikely that the contempt sanction ever again will be invoked against such officials by a district court, and that, even if it is, the officials, unlike any other litigants, can obtain appellate review. Equally important, the decision below inevitably will undermine public confidence in the even-handed administration of justice, and will foster cynicism toward the judicial system.

In short, while the court of appeals stated that it affirmed "the principle that no person is above the law" (12a), it did not mean it and it showed by its action that it did not mean it. Certiorari should be granted to restore the principle of equality to the federal justice system.

2. The court of appeals decision directing the district court to apply sanctions other than contempt deprives the plaintiffs of their fundamental due process right to obtain and introduce evidence essential to prove their allegations. It is in essential conflict with the recent decision of the Court of Appeals for the Seventh Circuit in *Hampton* v. *Hanrahan,* No. 77-1698 (April 23, 1979).

It is an aberration of the judicial process to withhold from a litigant relevant evidence essential to his case and not exempt from discovery or production by privilege. The adversary process is a fundamental component of civil and criminal litigation in Article III courts and other judicial bodies. *Alderman* v. *United States,* 394 U.S. 165; *United States* v. *Coplon,* 185 F.2d 629 (2d Cir. 1950) (Learned Hand, C.J.), *cert. denied,* 342 U.S. 920; *Board of Regents* v. *Roth,* 408 U.S. 564, 575, n.14; *Twining* v. *New Jersey,* 211 U.S. 78, 110-11; *Greene* v. *McElroy,* 360 U.S. 474; *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96; *Goldberg* v. *Kelly,* 397 U.S. 254. *See also* M. Frankel, *The Search for Truth: An Umpireal View,* 123 U. of Pa. L. Rev. 1031 (1975).

This Court has stated that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394. That right necessarily includes the right to adduce evidence not only, in Lord Argyle's famous phrase, because "[t]he public hath a right to the evidence of every individual of the society," [16] but because:

> [t]he due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it.

Baltimore & Ohio Railroad v. *United States*, 298 U.S. 349, 368-69.

Thus, even where a President of the United States sought to withhold information upon a claim of privilege, this Court held that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *United States* v. *Nixon*, 418 U.S. 683, 709. The principle has recently been strongly reiterated by the Court in a civil libel suit, despite substantial countervailing First Amendment considerations. *Herbert* v. *Lando*, 47 U.S.L.W. 4401 (April 18, 1979).[17]

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[16] 12 Cobbett, *Parliamentary History of England* 648 (footnote quotation from the Seckler Manuscript) (1742). *See also Branzburg* v. *Hayes*, 408 U.S. 665, 697-98.

[17] The *Herbert* Court wrote:

> As we stated [in *United States* v. *Nixon*,] in referring to existing limited privileges against disclosure, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."

Id. at 4406.

The government's interposition of the informer privilege in the instant case does not require or permit deviation from this principle, for "where the disclosure of an informer's identity, or the contents of his communication . . . is essential to a fair determination of a cause, the privilege must give way." *Roviaro* v. *United States*, 353 U.S. 53, 60-61. *See also Westinghouse Electric Corp.* v. *City of Burlington*, 351 F.2d 762, 767-68 (D.C. Cir. 1965).

The Seventh Circuit recently reiterated the applicability of *Roviaro* to civil cases, and ordered the disclosure of an informer's identity, in *Hampton* v. *Hanrahan, supra.* The *Hampton* case similarly involves a suit for damages against federal defendants for FBI COINTELPRO operations in which informers played a major role. The court summarized the history of misrepresentations by government officials in the discovery relating to informers, found that the plaintiffs' claims could not be fairly tried without revealing the identity of the informer, and noted that one of the relevant factors under the *Roviaro* balancing test is "the seriousness of the litigation," slip opinion at 65, stating:

> the proposition that all civil cases are less significant—and therefore require a higher level of justification for the disclosure of the informer—than all criminal cases is a dubious one.

Id. at 64, n. 40.

> This case, in which plaintiffs have alleged gross misconduct by federal and state law enforcement officials and have presented serious evidence to support those claims, is of paramount significance.

Id. at 67.

The court, relying upon *Roviaro* and the Second Circuit's decision on the government's first appeal in this case, reversed the trial court's upholding of the claim of priv-

ilege and ordered that the informer's identity be disclosed, under appropriate protective order, since disclosure was "essential to a just adjudication of plaintiffs' claims." *Ibid.*

In addition, the *Hampton* court found that the government improperly had refused to turn over to the plaintiffs other highly probative documents, thereby "actively obstruct[ing] the judicial process [and] denying plaintiffs the fair trial to which they were entitled." Slip op. at 73. The court of appeals directed that the district court require the government to produce the relevant evidence at a new trial, and that the court impose sanctions under Rule 37(b)(2) for the government's previous obstruction and disobedience. *Id.*

The court below relied upon *Roviaro* in upholding the district court's discovery order, on the government's first, unsuccessful, appeal of that order. Now that the district court has attempted to enforce that order through contempt, the court below ignores its earlier recognition of the import of *Roviaro*. It now directs that the district court apply a sanction other than contempt which will not compel the government to provide plaintiffs with the essential evidence. Rather, the government must deliver the files to the district court or its master to make "findings".[18] The injury to the plaintiffs is compounded by the suggestion that the findings might generally be based, not even upon the files themselves, but upon the summaries prepared by

[18] It should be noted that the government has not objected to the submission of the 18 informer files to a private attorney and his associates and clerical staff, for preparation of a special master's report. *Socialist Workers Party, et al.* v. *Attorney General, et al.*, No. 73 Civ. 3160 (S.D.N.Y. April 30, 1979) (order appointing special master). The order, which obeys the mandate of the court of appeals, highlights the anomaly of the court of appeals decision: the 18 files, rather than being submitted under strict protective order to *plaintiffs'* four attorneys, will instead be submitted to another private member of the bar, his associates and clerical staff, with the government's ready acquiescence.

the defendant FBI and submitted *ex parte* to the district court (19a).[19]

The district court issued the contempt order after making specific findings that it was the *only* sanction which would assure that the case could be litigated fully and fairly. The district court found:

1. That it was "an essential *threshold requirement* to any progress in the fair litigation of the issues" (75a) that plaintiffs' counsel have meaningful access to the information in the informer files (court's emphasis).

2. That the two "sanctions" proposed by the government would be an inadequate substitute for the information in the files, and "would leave plaintiffs in an impossible position," unable to "develop the full nature of the wrongdoings" inflicted upon them, or even to know of the damage which resulted (75a). This was particularly true in light of the history in this litigation of the defendants' evasive, half-true and outright false answers to plaintiffs' discovery requests (56a-65a).

3. That, for much the same reasons, no other issue-related sanctions would serve as an adequate substitute

[19] While unquestionably made in good faith, the court of appeals suggestion is a poignant reminder of what might have happened to the judicial process and to this country had President Nixon's "Stennis Compromise" been accepted by Special Prosecutor Archibald Cox, thereby foreclosing the compliance directed by this Court in *United States* v. *Nixon*, 418 U.S. 683. We think District Judge John Sirica's analysis is fair comment on the suggestion of the court below and emphasizes the value of the adversary system:

> In the first place, the Stennis plan had been silly. What the hell did Senator Stennis know about the case anyway? And how could the president and his lawyers conclude that I would ever have let into evidence a version of the tapes prepared by the White House, no matter what a single senator said about that version? The plan was, to my mind, an open defiance of my court order and of the order from the court of appeals.

J. Sirica, *To Set the Record Straight* at 167-68 (1979). *See also* P. Kurland, *Watergate and the Constitution* at 62 (1978).

for disclosure. The district court thus distinguished other cases in which Rule 37 issue-related sanctions were imposed:

> Without exception, these were cases in which the full nature of the wrongs allegedly inflicted on the plaintiffs, and of the damages allegedly resulting, were already known to the plaintiffs. The evidence which the Government declined to produce in those cases was evidence going to the issue of the Government's responsibility for the harms suffered by the plaintiffs—for example, the negligence or wrongful motive of an agent of the Government. When the government withheld the evidence on this issue, it was possible for the courts to impose as a sanction the resolution against the Government of this discrete, well-defined question of Government responsibility. . . . In all of these cases, there was a *workable alternative* to the contempt sanction.

80a-81a (court's emphasis).

The district court clearly was in the best position to decide the above questions. It, not the court of appeals, had an intimate knowledge of the six-year period of intensive pre-trial discovery in this litigation, of the background to and context of the discovery order, and of the files in question, as well as of the massive numbers of other documents relating to the claims in this case (75a-77a; 56a-66a). It engaged in a painstaking review of the entire case in reaching its decision to impose the sanction of contempt. A court of appeals is not competent to review such complex factual matters which lie at the core of the discretionary function of a trial judge. The district court's meticulous and careful findings as to the necessity for the contempt sanction must be accepted as valid.

The decision of the court of appeals thus not only vitiates the very discovery order which it itself upheld as being within the district court's discretion, but also makes it impossible for the plaintiffs to prove their case in full at

trial. The decision is in marked contrast to the decision of the Seventh Circuit in the *Hampton* case, which required actual disclosure of the critical evidence. Certiorari should be granted to make clear, as the *Hampton* court did, that a district court may impose appropriate sanctions, including contempt, and even against the Attorney General, to preserve a litigant's right to secure the evidence to which he is entitled in order to prove his case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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May 1979

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 239, 484, 485—August Term, 1978.

(Argued November 15, 1978 Decided March 19, 1979.)

Docket Nos. 78-6114, -6179, -3050

In re THE ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner-Appellant,

SOCIALIST WORKERS PARTY *et al.*,

Plaintiffs-Appellees,

—v.—

THE ATTORNEY GENERAL *et al.*,

Defendants-Appellants.

Before:

LUMBARD, FRIENDLY, and OAKES,

Circuit Judges.

The Government seeks review by appeal or by writ of mandamus of an order of the United States District Court for the Southern District of New York, Thomas P. Griesa, *Judge*, adjudging the Attorney General in civil contempt for failure to comply with an order requiring disclosure of certain FBI informants' files to plaintiffs' attorneys in a civil lawsuit. *Held*, the contempt order is not appealable

but is reviewable by the writ of mandamus; the contempt order is vacated and the district court is directed further to consider issue-related sanctions other than contempt.

ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York, (Thomas E. Moseley, Stuart I. Parker, Frank H. Wohl, Assistant United States Attorneys, of counsel), *for Appellants and Petitioner.*

LEONARD B. BOUDIN, Rabinowitz, Boudin & Standard, New York, NY (Eric M. Lieberman, Rabinowitz, Boudin & Standard, Margaret Winter, Mary B. Pike, New York, NY, on the brief), *for Appellees.*

EUGENE GOLD, District Attorney, Kings County, Brooklyn, NY (Richard E. Mischel, Assistant District Attorney, of counsel), National District Attorneys Association, Inc., Chicago, Ill., *amici curiae in support of petitioner-appellant and other defendants-appellants.*

OAKES, *Circuit Judge*:

The Government appeals from an order of the United States District Court for the Southern District of New York, Thomas P. Griesa, Judge, holding the Attorney General of the United States in civil contempt for refusing to release eighteen files disclosing the names of a number of allegedly confidential government informants to appellees' attorneys, in accordance with an order of the

court. In the alternative the Government petitions for a writ of mandamus directing the district court to withdraw its order of contempt and its order directing release of the files. We hold the order nonappealable but, in view of the extraordinary circumstances and nature of the case, grant the petition for a writ of mandamus, vacate the contempt order, and direct the district court further to consider issue-related sanctions under Fed. R. Civ. P. 37(b)(2).

BACKGROUND

This case arises out of a complaint filed on July 18, 1973, by the Socialist Workers Party (SWP), its affiliate, the Young Socialist Alliance (YSA), and some individual members alleging that over several decades the Federal Bureau of Investigation (FBI) has engaged in an unlawful investigation of plaintiff organizations with the purpose of disrupting or destroying them. The Government concedes that the investigation included the use of informants; physical, photographic, and electronic surveillance; a mail cover in 1973; certain surreptitious entries; and a "counterintelligence" or "disruption" plan. The complaint runs against the United States itself under the Federal Tort Claims Act, against several high public officers in their official capacities (including the Attorney General of the United States), and against former officers in their personal capacity (Richard M. Nixon, John Mitchell, John W. Dean III, certain named FBI agents, and other unnamed government employees and agents). Discovery disclosed that the FBI made widespread use of paid informants to obtain information about plaintiffs' activities. Approximately 1,300 individuals provided confidential information to the FBI on more than one occasion, and 300 of them were members of the SWP or YSA.

When the scope of the informants' activities was uncovered and it was revealed that the FBI had falsely answered an interrogatory with respect to an individual informant's activities,[1] plaintiffs sought to obtain production of some of the informants' files themselves. Although the Government voluntarily furnished the files of seven informants whose identities had been disclosed, it refused to produce the files of nineteen informants whom plaintiffs had chosen as representative from the interrogatory answers. (The Government subsequently withdrew its objection as to one of these files when the informant's identity was disclosed.) The district judge personally conducted an *in camera* review of the extensive informant files in question, having secured detailed summaries from the Government to assist his evaluation.

On May 31, 1977, the court ordered the Government to make the FBI files and summaries regarding the eighteen undisclosed informants available *in camera* to four of plaintiffs' attorneys. The Government sought review of the order by appeal or mandamus, but this court denied review in *In re United States*, 565 F.2d 19 (2d Cir. 1977), *cert. denied*, 436 U.S. 962 (1978) (*SWP II*).[2] The district court subsequently attempted to settle the disclosure issue by a proposal that the Government release nine files to the plaintiffs. The Government did not accept the proposal but did offer to release to the plaintiffs under a protective

1 When a member informant named Timothy Redfearn was arrested in July 1976 for a burglary, his undercover status became public. The Government released his file to plaintiffs, who then discovered that interrogatory answers as to his activities had failed to disclose that he had removed documents from SWP and YSA offices.

2 The first appellate decision in this lawsuit, *Socialist Workers Party v. Attorney General*, 510 F.2d 253 (2d Cir. 1974), *rev'g* 387 F. Supp. 747 (S.D.N.Y.), *stay denied*, 419 U.S. 1314 (Marshall, Circuit Justice), overturned the district judge's grant of a preliminary injunction restraining the FBI from monitoring a YSA national convention.

order the files of four informants who had consented to disclosure. When the Attorney General on his own authority under 5 U.S.C. § 301 and 28 C.F.R. §§ 16.23 and 16.24(b) determined not to comply with the disclosure order, the district court, rejecting alternative sanctions, first warned the Attorney General on June 30, 1978, that noncompliance would result in a civil contempt citation and then adjudged him in contempt on July 6, after he declared that he would refuse production. Judge Gurfein of this court stayed the contempt order on July 7, 1978, to permit the Attorney General to seek review of the contempt orders by a full panel of this court. Subsequent to the argument on this appeal the district court reconsidered, in light of *Birnbaum v. United States*, Nos. 77-6175, 77-6181, 77-6183 (2d Cir. Nov. 9, 1978), the Government's motion to dismiss the complaint but denied the motion.

APPEALABILITY

The Government contends that the contempt order is appealable as a collateral order, as a third party contempt, or as an exceptional order implicating the constitutional separation of powers. None of these contentions is persuasive.

The Government first maintains that the order is appealable under the so-called "collateral order" doctrine, a judicial gloss upon the statutory requirement of finality, 28 U.S.C. § 1291, created by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). But we have held that discovery orders are not appealable under this doctrine even where the appellant asserts a work product privilege. *American Express Warehousing, Ltd. v. Transamerica Insurance Co.*, 380 F.2d 277, 280-82 (2d Cir. 1967). And in *International Business Machines Corp. v. United States*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995

(1974) (*IBM*), at the Government's earnest urging, we followed *Fox v. Capital Co.*, 299 U.S. 105 (1936), and *Doyle v. London Guarantee & Accident Co.*, 204 U.S. 599 (1907), by holding that a party may not appeal a civil contempt order imposed for breach of a discovery order even where he had resisted discovery on the basis of the attorney-client work product privilege. Although this case involves the informant privilege[3] and although we stated in *IBM* that such a contempt order might be appealable in "certain extraordinary circumstances," 493 F.2d at 119, we do not retreat from the general standard there expressed.

The Government nevertheless argues that the contempt order here "falls within that narrow category of orders that can be considered separable from the main action and which are too important to be denied review," apparently because the order is directed against the Attorney General. We agree that this order is important, but we are as unpersuaded about its severability as we were in *IBM*, *supra*. In *Coopers & Lybrand v. Livesay*, 46 U.S.L.W. 4757 (U.S. June 21, 1978), the Supreme Court quite pointedly limited the collateral order doctrine to orders which "conclusively determine the disputed question, resolve an important issue *completely separate* from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Id.* at 4759 (emphasis added). *See also Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770, 772-74 (2d Cir. 1972). Notwithstanding the presence of the Attorney General as a

3 For a discussion of the role of the informant privilege in civil cases, *see generally In re United States*, 565 F.2d 19, 22 (2d Cir. 1977), *cert. denied*, 436 U.S. 962 (1978); *Usery v. Ritter*, 547 F.2d 528 (10th Cir. 1977); *Black v. Sheraton Corp.*, 47 F.R.D. 263 (D.D.C. 1969) (Sirica, J.), *aff'd*, 564 F.2d 550 (D.C. Cir. 1977). *See also Weatherford v. Bursey*, 429 U.S. 545 (1977); *Roviaro v. United States*, 353 U.S. 53 (1957); *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

party, here the issue of discovery is integral to, rather than "completely separate from," the merits of the action.

The Government also argues that the contempt order is reviewable as a third party contempt because the United States, not the Attorney General, is the real party in interest. We disagree. Although it is true that the present Attorney General is not named a defendant in his personal capacity,[4] he is named in his official capacity and is in no sense only a nominal or formal party. Any equitable relief granted would surely run against him in that capacity. Thus, cases permitting appeal by contemnors who were attorneys but not parties to the underlying action, *e.g.*, *In re Murphy*, 560 F.2d 326 (8th Cir. 1977); *Appeal of United States Securities & Exchange Commission*, 226 F.2d 501, 520 (6th Cir. 1955), are simply inapposite.

The Government finally argues that this case comes within the very narrow exception to the finality rule recognized in *United States v. Nixon*, 418 U.S. 683, 690-92 (1974). In *Nixon*, the Court held that the President of the United States, a third party in a criminal proceeding, need not follow the traditional avenue of placing himself in contempt to obtain review of an order denying his motion to quash and requiring him to produce evidence pursuant to a subpoena duces tecum. To require the President to take that route "would be unseemly, and would present an unnecessary occasion for constitutional confrontation between the two branches of the Government." *Id.* at 691-92. But *Nixon* is readily distinguishable from this case. *Nixon* did not involve, as this case does, a suit against the United States in which a party (here, the Attorney General) was asserting a privilege. Review was more appropriate in

4 The complaint also names a former Attorney General in his personal capacity.

Nixon because the assertion of a privilege simply deflected the search for truth in a separate criminal action and did not present an obstacle to a lawsuit directly challenging government conduct. Moreover, in *Nixon* the President claimed a privilege as to his *personal* papers. Here the Attorney General seeks to protect from disclosure official records that he holds or has under supervision in his official capacity only. Finally, and most important, the executive responsibilities and constitutional status of the Attorney General do not compare to those of the President.[5] The Attorney General has no greater statutory authority over his department's official records than does any other Cabinet officer.[6] Since the earliest days of this nation, courts have declined to accord to Cabinet or other executive officials the same prerogatives that they accord to the President himself. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66, 170-71 (1803); *Sawyer v. Dollar*, 190 F.2d 623, 633-34, 638-39 (D.C. Cir. 1951), *vacated as moot*, 344 U.S. 806 (1952); *Bank Line, Ltd. v. United States*, 163 F.2d 133, 138 (2d Cir. 1947) (Augustus N. Hand, J.) ("It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institutions.")

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5 The opinion in *Nixon* clearly relied on the unique constitutional role of the Presidency. *United States v. Nixon*, 418 U.S. 683, 691-92 (1974). *See also Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500-501 (1867).

6 5 U.S.C. § 301 provides:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

MANDAMUS

We turn, then, to the question whether we should review the contempt order by issuing a so-called "extraordinary" writ—here, the writ of mandamus, 28 U.S.C. § 1651(a).[7] We commence with the ready acknowledgment that only the truly exceptional case warrants this exercise of supervisory control. "[T]he touchstones . . . are usurpation of power, clear abuse of discretion and the presence of an issue of first impression." *American Express Warehousing, supra*, 380 F.2d at 283. The Supreme Court has interpreted the standard for issuance of the writ more liberally in some cases than in others. *Compare Schlagenhauf v. Holder*, 370 U.S. 104 (1964), and *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 258-60 (1957), *with Will v. United States*, 389 U.S. 90 (1967). *See* Note, *Supervisory and Advisory Mandamus under the All Writs Act*, 86 Harv. L. Rev. 595 (1973). In the Supreme Court's most recent discussion of the subject, the plurality emphasizes that the moving party must show a "clear and indisputable" right to the writ, *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978); this admonition would, however, be more significant if a majority of the Court had endorsed it. Finally, we note that this court has been more reluctant than some courts[8] to exercise freely the supervisory or advisory power to issue writs of mandamus. *National Super Spuds, Inc. v. New York Mercantile Exchange*, Nos. 78-3041, 78-6146, 78-6152, slip op. 1011, 1026 (2d Cir. Jan. 17, 1979); *Kaufman v. Edelstein*, 539 F.2d 811, 816-19 (2d Cir. 1976).

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7 28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

8 *E.g., Colonial Times, Inc. v. Gasch*, 509 F.2d 517 (D.C. Cir. 1975).

In *American Express Warehousing, supra,* however, we pointed out:

> When a discovery question is of extraordinary significance or there is extreme need for reversal of the district court's mandate before the case goes to judgment, there are escape hatches from the finality rule: a certification by the district court under 28 U.S.C. § 1292(b) . . . or an extraordinary writ.

Id. at 282. Two other cases, not mentioned by the parties, illuminate the meaning of "extraordinary significance" and "extreme need for reversal." In *Investment Properties International, Ltd. v. IOS, Ltd.*, 459 F.2d 705, 707 (2d Cir. 1972), we granted a writ of mandamus requiring the district court to permit plaintiffs to depose defendants' officers in order to establish standing and subject-matter jurisdiction because we viewed such discovery as "the heart of the controversy." In *United States v. United States District Court*, 444 F.2d 651 (6th Cir. 1971) (Edwards, J.), *aff'd*, 407 U.S. 297 (1972), the court granted the writ in connection with a suppression hearing in a pending criminal trial to determine whether the Attorney General could resist disclosure of information that he had obtained as a result of authorized warrantless wiretapping in an internal security matter. Because it was "an extraordinary case" in which "[g]reat issues are at stake for all parties concerned," because the Government asserted that the order was illegal, and because the case posed a "basic issue which has never been decided at the appellate level by any court," the Sixth Circuit took jurisdiction, even though it ultimately upheld the ruling of the district court.[9]

9 In affirming the decision of the court of appeals, the Supreme Court, without discussion, expressed agreement with the court of appeals' holding that it had jurisdiction to issue the writ of mandamus. *United States v. United States District Court*, 407 U.S. 297, 301 n.3 (1972).

This too is an extraordinary case. *See Ex parte Fahey*, 332 U.S. 258, 260 (1947). It is, so far as we know, the first case brought by a political party[10] against the Government itself for damages as well as injunctive relief for allegedly illegal surveillance of that party. The plaintiffs contend that the FBI used informants to disrupt the party by means of illegal break-ins, wiretaps, mail openings, and various other conversions, trespasses, and illegal acts, and thus that they seek information "at the heart of the matter." The suit also asserts that high executive officials are personally liable for some of these acts.

The case also involves a claim of privilege on behalf of an unprecedented number of informants—over 1,300 according to the Government's brief, of whom approximately 300 served as members and 60 as office-holders of plaintiffs. This claim of privilege includes the larger claim, to which Attorney General Griffin Bell has attested,[11] that the failure to recognize the privilege would adversely

10 Two of the plaintiffs here are political parties, the Socialist Workers Party and the Young Socialist Alliance.

11 Releasing these eighteen files to plaintiffs' counsel would have a significantly detrimental effect on law enforcement by undermining the pledge of confidentiality which the FBI makes to informants, which pledge its agents made in this case. Such action would signal to other informants and potential informants that the United States would not or could not continue to honor the pledge of confidentiality which has been the cornerstone of its relationship with informants, thereby adversely affecting the ability of other law enforcement agencies, such as the Internal Revenue Service, the Drug Enforcement Administration, the Secret Service, the Postal Inspection Service, the Bureau of Alcohol, Tobacco and Firearms, the Immigration and Naturalization Service, the Securities and Exchange Commission and the Department of Labor, to attract and maintain sources of information. Release of these names here and in other cases under similar circumstances would also tend to deter potential and actual foreign counterintelligence informants from cooperating with the United States. The resulting diminution of information and the effect on law enforcement and foreign counterintelligence would, in my judgment, be substantial.

Affidavit of Griffin B. Bell, June 13, 1978, ¶ 5.

affect the entire law enforcement and intelligence-gathering apparatus of the United States. The importance of this privilege was emphasized in the previous decision of this court which warned against disclosure for which there is no substantial need. *SWP II, supra,* 565 F.2d at 23. Noting that "[w]e are far from convinced that plaintiffs' attorneys require a wholesale disclosure of informants' identities in order to prepare their case for trial," the court said:

> As this Court stated when this case was before it on a prior appeal, the district court should weigh "the serious prejudice to the Government from compromising some or all the informants for all time, even though the final determination of the action may be for the defendants." *Socialist Workers Party v. Attorney General,* 510 F.2d 253, 257 (2d Cir. 1974).

Id. at 24.

This case is unusually important for another reason—because the order for which review is sought adjudged the Attorney General of the United States in civil contempt. Although we unequivocally affirm the principle that no person is above the law, and although we do not find petitioner's status as chief law enforcement officer sufficient to permit an appeal under the *Nixon* exception, we cannot ignore the fact that a contempt sanction imposed on the Attorney General in his official capacity has greater public importance, with separation of power overtones, and warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant. We do not, of course, hold that mandamus is always appropriate to review a contempt order against the Attorney General, but we do think that this factor is entitled to some weight.[12]

12 We note in passing that the order before the *SWP II* court was directed to the FBI. The claim of privilege was asserted by affidavit and testimony of James B. Adams, an Assistant to the Director-Deputy Associate Director (Investigation) of the FBI. The Attorney General interposed himself in the disclosure controversy after the *SWP II* decision.

In light of the underlying issues of first impression; a question of the informant privilege that involves "a vital interest" of the United States, according to the Attorney General; and the seriousness of a contempt citation against the Attorney General in his official capacity, we have the "extraordinary significance" that *American Express Warehousing, supra,* 380 F.2d at 282-83, requires for the issuance of a writ of mandamus.

THE MERITS

We begin our analysis of the merits by stressing two considerations. The first is the nature of the contempt power itself. Just as, we trust, an Attorney General would not lightly invoke a privilege such as the one that he invokes here, so too the court must not lightly invoke its contempt power. For the exercise of that power is, even in the context of a private attorney, "awesome in its implications." *United States v. Wendy,* 575 F.2d 1025, 1030 (2d Cir. 1978). Second, in an extraordinary case such as this, the significance of abuse of discretion is magnified. *United States v. United States District Court, supra,* is an excellent illustration: the issue was so important that mandamus was granted to *affirm* the lower court. Here, as noted above, the contemnor is not simply an attorney but the chief law enforcement officer of the nation, a public official who exercises powers entrusted to him by both the executive and legislative[13] branches, with obligations to the

13 For example, only the Attorney General or his designee may authorize an application for a wiretap order under 18 U.S.C. § 2516. *See Giordano v. United States,* 416 U.S. 505 (1974).

judicial branch, and who is the principal attorney for another branch of government coequal to the judicial branch in constitutional function and design. Courts accordingly owe him respect as an official and, absent an abuse of power or misuse of office, the most careful and reasoned treatment as party or as litigant. Thus, holding the Attorney General of the United States in contempt to ensure compliance with a court order should be a last resort, to be undertaken only after all other means to achieve the ends legitimately sought by the court have been exhausted.

Judged by these standards, the action of the trial court unfortunately falls short, for in our view the court insufficiently considered issue-related sanctions. The Federal Rules of Civil Procedure permit many sanctions other than contempt, alternatives that the court did not sufficiently explore except to reject the Government's proposals.

Under Fed. R. Civ. P. 37(b)(2), the sanctions for noncompliance with a discovery order include: (1) an order that "designated facts shall be taken to be established"; (2) an order "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence"; and (3) an order "striking out pleadings or parts thereof . . . or rendering a judgment by default." [14]

14 Fed. R. Civ. P. 37(b)(2) provides in full:

> (2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
>
> (E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

15 It might appear that a partial default judgment cannot be entered against the United States, for Fed. R. Civ. P. 55(e) provides that

There are, of course, limitations upon the Rule 37 sanctions that may be imposed against the Government. These include the following: (1) punitive damages may not be awarded against the United States, 28 U.S.C. § 2674; (2) expenses and attorney's fees may not ordinarily be imposed against the United States, Fed. R. Civ. P. 37(f); (3) only actual or nominal damages can be recovered against the United States for deprivation of constitutional rights, *see Carey v. Piphus*, 435 U.S. 247 (1978); (4) due process requires that the most severe sanctions of dismissal or default be imposed only if the failure to comply is due to willfulness, bad faith, or fault, and not to an inability to comply. *See Societe Internationale v. Rogers*, 357 U.S. 197, 209, 212 (1958); *Flaks v. Koegel*, 504 F.2d 702 (2d Cir. 1974).[16]

The Government suggested three options to contempt below. First, it proposed that plaintiffs be allowed to "establish from facts within their knowledge" the amount of damages at each SWP and YSA chapter and be given the benefit of a presumption that such damages were the result of informant activity. The Government would have the burden of proving either that there were no damages or that there was an alternative cause for the loss. Second, the Government suggested that plaintiffs go forward with "full discovery" based on the twelve[16] informant files now available to them and present to the court a kind of test case of injury and damages so that the court could determine the extent to which information in the files was necessary to determine the amount of actual damages. Third, if neither of these sanctions were appropriate, the court and counsel should devise some other issue-related sanction.

Judge Griesa rejected the first of these proposals because it would leave plaintiffs

> in an impossible position. Without a representative sample of the detailed evidence in the informant files, and some reasonable summarization of the other informant file evidence, plaintiffs are deprived of the

"[n]o judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." The Government concedes, however, that this limitation does not bar a partial final judgment. Gov't Brief at 120*. As one commentator has noted, a court might, notwithstanding Rule 55(e), treat as admitted those facts that the litigant would have had to prove by means of the evidence that the Government would have produced if it had complied with discovery. 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2702, at 358 (1973). Such a procedure might well have the same effect as a partial default judgment.

16 As noted above, the Government has already produced eight files and has said it is willing to produce, subject to certain deletions, four of the eighteen here in question.

> most important source of evidence needed by them both to develop the full nature of the wrongdoings and damages, and to rebut Government defense evidence.

And as to the second proposal for sanctions, Judge Griesa thought that the twelve files that the Government was willing to produce "do not constitute a fair selection";[17] he characterized the proposal as "simply a renewed effort to whittle down plaintiffs' already modest, compromise request for documents."

The court also concluded that any other sanction would be unproductive and would only result in delay. The court had previously stated that the informant files evidence was "so basic and essential that no major issue in the case—whether relating to injunctive relief, claims for damages, or jurisdictional defenses—can be resolved without developing a factual record with evidence from these files."[18]

After our independent review of the eighteen informant files summaries, we conclude that it was clearly erroneous for the district court to determine that the files are so central to the plaintiffs' case that contempt is the only appropriate sanction for the Government's failure to disclose them. Because that determination is erroneous, the district court has an obligation to investigate more thoroughly than it has to date reasonable alternative sanctions to contempt. Our conclusion that the court abused its discretion

17 The court said that the 12 files "do not cover the range of locations and activities embraced in the total number of files ordered to be produced by the Court."

18 We note that the district court's decision, which was dated June 30, 1978, does not take into account the general suggestion in Attorney General Bell's affidavit of June 13, 1978, that appropriate sanctions would be as set forth in Rule 37(b)(2)(A)-(C), that is, "concessions of certain facts or legal issues, or partial judgment in plaintiffs' favor."

thus requires, in this unusual case, the grant of the extraordinary writ of mandamus.

MANDATE

In effectuating this court's mandate to consider alternative sanctions, the district court should of course impose those sanctions which, so far as possible, put plaintiffs in the position that they would have been in if the Government had disclosed the information. We recognize that the task of fashioning such a sanction will not be easy. But we believe that much of the difficulty of creating a feasible and equitable sanction will be avoided if the district court produces a set of representative findings from the informant files for the benefit of the plaintiffs. Of course, this alternative might not itself be a sufficient sanction for the Government's noncompliance with the discovery order. The information supplied by such findings will nevertheless help the plaintiffs in two ways: by improving their ability to prosecute the action without the files and by improving their ability to identify the damages that they have suffered and to demonstrate what further sanctions, if any, are appropriate. The court should frame its findings with these two purposes in mind.

We have reviewed in depth the summaries of the informants' files in question, and it is our view that the district court, or a master under its direction, can feasibly make representative findings that would supply the plaintiffs with much of the information that they need to establish their claims or to propose other sensible sanctions, if any are needed, without compromising the identity of the informants. We do not, of course, purport to anticipate the precise content of those findings. The district court should not consider exhaustive the sample findings that we suggest and should include only findings relevant to plaintiffs' case. Indeed, the judge's own discussion of the summaries in open court on April 14, 1977, and June 22, 1977, reproduced in the Appendix on Apeal at 842-60, 209-10, if reduced to more detailed formal findings, would go a long way toward satisfying this court's mandate.

We have attached as an appendix to this opinion a "suggested form of representative findings," the headings of which follow those in the summaries of the informant files submitted to this court by the Government. Although most of the findings may be framed in general terms, findings with respect to disruptive or illegal activity should be as specific as possible without disclosing the identity of the informant. In particular, such findings should detail to the extent possible the nature and extent of the damage that the plaintiffs may have suffered as a result of the informant activity.

The representative findings might follow the form of the summaries themselves. The findings can usually be based upon the summaries alone. If the summary's description of an important matter is too vague or incomplete, however, the district court or master may refer to the original informant file. In other words, the court may provide plaintiffs with what the court itself suggested was missing—a "representative sample of the detailed evidence in the informant files."[19] We agree with the district court's evaluation that much of this evidence follows a standard pattern.[20] And we think that the court can prepare these

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19 The district court also spoke of the need for "some reasonable summarization of the other informant file evidence." The purpose of the representative findings that we have outlined here, however, is only to aid the district court in choosing an appropriate sanction for the Government's nondisclosure of the 18 files. Consequently the findings need only extend to those 18 files.

20 The district court on April 14, 1977, noted, "What I am getting at, the pattern of the activity, it seems to me, within limits, is somewhat

findings without disclosing the identities of the informants;[21] as the district judge said, with respect to providing information relating to all the informant files:

> I think that the chances are very great that this can be done without any substantial revelation of the identity of the informants because I am now reasonably convinced that the identity of the individuals in all, virtually all, cases would be almost useless to me as a judge or to the parties to the litigation.

We grant the petition for a writ of mandamus, vacate the contempt order, and direct the district court to impose such issue-related sanctions as are consistent with this opinion and otherwise proper. Despite the Government's request, we decline to examine the underlying disclosure order. Apart from the question whether we have jurisdiction to review at this time that order,[22] we believe that review is not wise because we have not held that contempt is an appropriate sanction for noncompliance with the order.

Judgment in accordance with opinion: jurisdiction retained.

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standard." The court went on to say, however, "Where does that leave any issue in the case? It seems to me that there still is an issue as to the degree, the extent, the comprehensiveness of the use of informants." We think that the findings can also state whether there was an FBI "plan" and, if so, its extent and comprehensiveness.

21 Disclosing information without disclosing identities will require a sensitive formulation of findings. In particular, the courts should be careful that separate findings, except where absolutely necessary to development of quintessential information, do not give enough cumulative information about an informant to permit his identification, even though the findings considered separately protect his identity.

22 *Compare Garland v. Torre*, 259 F.2d 545, 550 n.11 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), *with Maggio v. Zeitz*, 333 U.S. 56, 68-69 (1948).

APPENDIX

Suggested form of representative findings

1. *Background information.*

The 18 files cover informant activity in ..... cities, ranging from small to large in size. The cities included ....., ... [Note: delete name of city if number of members is so small that informants would be identifiable.].

2. *Method of recruitment.*

..... of the ..... informants described in these files volunteered to become informants; ..... were actively recruited by the FBI.

3. *Confidential relationship with the FBI.*

..... were advised by the FBI in writing, and ..... orally, that the FBI would never disclose their identities. ..... signed statements agreeing to keep their relationship with the FBI and their information confidential.

4. *Organizations with which informants were affiliated.*

..... of the informants were members of the SWP only; ..... were also members of other organizations.

Some informants belonged to as many as ..... organizations and reported on as many as ..... .

5. *Informants' relationship with the SWP and their method of obtaining information.*

In ..... cases, informants obtained non-public information from the SWP or its members in an undisclosed

manner. In ..... of these cases, the informants held positions with the SWP that might have permitted them to obtain this information by non-surreptitious means. Informants #....., ..., however, did not have potential access by virtue of their positions.

Informants had the following positions with the SWP, for the following periods:

Informant # .....: .....

Informant # .....: .....

etc.

6. *Activities.*

A. *Topics reported on at meetings:*

The informants' reports about SWP described the following topics, among others: specific political issues of current interest; local fund-raising and organizational plans; election campaigns; ..... ; ..... .

The reports indicate that many informants attended meetings regularly and gave weekly reports. For example, Informant # 306 attended and/or reported on approximately 1300 meetings and activities of New Left organizations over a 13-year period.

Discussion of the Fourth International was limited to ..... .

There was [no/some] discussion of disruptive or violent activity during the SWP meetings.

B. *Other activities that source reported:*

Among the unusual activities that the sources reported are the following—

Informant # 306 attended an SDS workshop on explosives;

..... ;

..... .

C. *Reports concerning personal information:*

Reports of some informants also contained personal information about members, such as information about health, employment status, travel plans, social contacts, sexual relationships, and personal habits.

Informant ..... reported that ..... .

The Bureau instructed ..... informants to gather personal information with respect to the following matters and in the following manner: ..... .

D. *The obtaining or copying of documents or other items:*

..... of the informants had access to nonpublic documents by virtue of their official position.

Informants forwarded to the Bureau pamphlets, SWP reports and publications, internal correspondence between SWP officials, and ..... .

Informant # 1121 voluntarily provided trash to the Bureau by virtue of his position as janitor. The trash contained minutes, correspondence about SWP affairs, membership lists, financial records, and ..... . FBI headquarters advised the local Bureau office that his "trash cover" could not be used, but before the informant could be approved on this basis, he resigned.

E. *Counterintelligence program (COINTELPRO):*

..... of the files mention COINTELPRO activity, and ..... mention involvement in the SWP disruption program.

The following specific instances are mentioned:

[Describe conduct and file number]

F. *Informants' participation in organizations:*

..... informants acted as photographers.

..... voted in secret elections for SWP officers.

Informants also hosted meetings, assisted in mailings, engaged in leafletting and fund-raising, ... , ...

G. *Comments by the FBI concerning informants:*

[Discuss FBI rating system and any unusual reports.]

H. *Cooperation with other investigative agencies:*

..... of the informants cooperated with other federal investigative agencies, including ..... ; ..... cooperated with other state investigative agencies, including ..... .

I. *Miscellaneous activities:*

Informant # 73 provided a report that was useful in a security of government employees investigation. He also advised the Bureau that the local SWP does not have any real influence within the NAACP.

Informant # 306 reported that certain FBI employees were associated with an anti-war organization.

Their supervisor asked them to resign; some did. The anti-war organization planned a press conference to embarrass the FBI.

The same informant provided the names of individuals who contacted the SWP at the national headquarters in New York City requesting information about the SWP.

Other informants reported ..... .

7. *Compensation.*

..... of the informants were paid. Rates ranged from ..... [monthly/weekly] to ..... [monthly/weekly].

8. *Willingness to testify.*

..... informants have expressed their willingness to testify in open court or before an administrative hearing board.

..... informants have advised that they are unwilling so to testify.

9. *General findings.*

[Give a general characterization of the scope, extent, and comprehensiveness of the FBI's infiltration of the SWP; discuss whether the evidence suggests an overall FBI plan; and, if so, describe the nature of the plan. *See* Appendix on Appeal 852-57.]

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 78-6114, 78-6179, 78-3050

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of March one thousand nine hundred and seventy-nine.

Present:

HON. J. EDWARD LUMBARD,
HON. HENRY J. FRIENDLY,
HON. JAMES L. OAKES,

Circuit Judges.

SOCIALIST WORKERS PARTY, YOUNG SOCIALIST ALLIANCE, JACK BARNES, BARRY SHEPPARD, PETER CAMEJO, FARRELL DOBBS, JOSEPH HANSEN, WILLIE MAE REID, LINDA JENNESS, ANDREW PULLEY, NORMAN OLIVER, EVELYN SELL, MORRIS STARSKY and CHARLES BOLDUC,

Plaintiffs-Appellees,

v.

ATTORNEY GENERAL OF THE UNITED STATES, SECRETARY OF THE TREASURY, SECRETARY OF DEFENSE, POSTMASTER GENERAL, SECRETARY OF THE ARMY, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, DIRECTOR OF CENTRAL INTELLIGENCE, DIRECTOR OF SECRET SERVICE, DIRECTOR OF DEFENSE INTELLIGENCE AGENCY, DIRECTOR OF NATIONAL SECURITY AGENCY, DIRECTOR OF ALCOHOL, TOBACCO AND

FIREARMS DIVISION (U.S. TREASURY), DIRECTOR OF SELECTIVE SERVICE SYSTEM, CIVIL SERVICE COMMISSIONERS, THE PRESIDENT OF THE UNITED STATES, RICHARD M. NIXON, JOHN MITCHELL, JOHN W. DEAN III, ARTHUR J. GREENE, JR., GEORGE P. BAXTRUM, JR., JOHN F. MALONE, UNKNOWN AGENTS OF THE UNITED STATES GOVERNMENT, and THE UNITED STATES OF AMERICA,

Defendants,

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from an order of said District Court be and it hereby is dismissed in accordance with the opinion of this court.

IT IS FURTHER ORDERED that the petition for a writ of mandamus be and it hereby is granted in accordance with the opinion of this court.

JUDGMENT ENTERED 4/13/79

A. DANIEL FUSARO,
Clerk

By: ARTHUR HELLER,
Deputy Clerk

/s/ RAYMOND F. BURGHARDT
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IN RE UNITED STATES OF AMERICA, PETITIONER

SOCIALIST WORKERS PARTY ET AL.,

PLAINTIFFS-APPELLEES,

v.

THE ATTORNEY GENERAL ET AL.,

DEFENDANTS-APPELLANTS.

(No. 1562, Docket 77-3041)

Argued Aug. 19, 1977.

Decided Oct. 11, 1977.

Before VAN GRAAFEILAND and WEBSTER,* Circuit Judges, and DOOLING, District Judge.**

VAN GRAAFEILAND, Circuit Judge:

This action was commenced in 1973 by the Socialist Workers Party (SWP), the Young Socialist Alliance (YSA) and several individual members of these organizations. Their second amended complaint, which seeks both injunctive relief and some $40 million dollars in compensatory and punitive damages from the United States and various officials and em-

*Of the Eighth Circuit, sitting by designation.

**Of the Eastern District of New York, sitting by designation.

ployees, recites a litany of alleged wrongful acts on the part of the defendants beginning in 1938, including blacklisting, harassment, disruption, wiretapping, mail tampering, breaking and entering, and assault. Plaintiffs have had broad discovery by way of interrogatories, depositions and production of documents.[1] This has disclosed that since 1960 some thirteen hundred unidentified persons have provided information concerning plaintiffs on at least two occasions to the FBI and, of these, approximately three hundred were at one time members of SWP or YSA, or both. This appeal concerns the disclosure of their identities.

From the outset of discovery, plaintiffs have insisted that they would be satisfied with nothing less than the names of all informants. They contend that the informants would not be endangered by this disclosure and that, because the investigation of SWP and YSA has been terminated, the informants no longer provide a continuing source of information to the government which should be preserved. Defendants have just as adamantly asserted that none of the informants should be identified, contending that the government's ability to gather information for general law enforcement purposes would be severely damaged by disclosure in this case and that plaintiffs have failed to show that their need for disclosure outweighs the public interest in encouraging the flow of information from confidential sources.

[1] Approximately seventy thousand documents have been turned over to plaintiffs by governmental agencies, approximately fifty-three thousand of these by the FBI. Nine sets of interrogatories have been directed to the FBI alone. At least eighteen depositions have been taken, twelve of them of FBI employees.

The district judge, faced with an almost insoluble problem, has had difficulty in coming to grips with it. The matter was brought to a head by plaintiffs' motion for an order directing the FBI to furnish the names of eighteen informants, theretofore identified only by code numbers, and to produce all documents relating to them. The district judge conducted an *in camera* inspection of the twenty-five file drawers of documents involved in this request, directed the government to prepare summaries of the files, and set forth a list of subjects which he wanted covered in the summaries. He stated that it might be necessary for the government to provide plaintiffs with similar information relating to all the informant files and indicated his belief that this could probably be done without any substantial revelation of the identity of informants, because he was "reasonably convinced that the identity of the individuals in all, virtually all, cases would be useless to [him] as a judge or to the parties to the litigation."

Plaintiffs' counsel reasserted, however, that plaintiffs were unwilling to settle for anything less than disclosure of the names of all informants, and the district judge thereupon issued the oral *in camera* order which is the subject of this appeal. In a somewhat discursive ruling, he stated that plaintiffs' counsel must have access to the detailed facts about the use of informants and that the FBI must provide the eighteen files[2] for inspection by four attorneys representing the plaintiffs.[3] He stated also that production would not stop with the eighteen files but would undoubtedly

[2] The FBI has withdrawn its objection as to one of the files, because plaintiffs already know the name of the informant.

[3] One of the four attorneys is also a member of SWP.

go beyond and might encompass the full thirteen hundred informant files. The lawyers were ordered to keep the information which they secured confidential and, indeed, not to make public the disclosure procedure which the court had decided to follow.

Defendants seek review of this order under both 28 U.S.C. §§ 1651 and 1291, relying as to the latter section upon the collateral order rule of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Plaintiffs concede that this Court has jurisdiction. However, jurisdiction cannot be conferred by agreement of the parties, *Stratton* v. *St. Louis Southwestern Railway*, 282 U.S. 10, 18, 51 S.Ct. 8, 75 L.Ed. 135 (1930); *IBM Corp.* v. *United States*, 493 F. 2d 112, 119 (2d Cir. 1973), *cert. denied*, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed. 2d 774 (1974), and it is the court's duty to determine whether the order is cognizable for review. *United States* v. *Cusson*, 132 F. 2d 413, 414 (2d Cir. 1942).

In *Xerox Corp.* v. *SCM Corp.*, 534 F. 2d 1031 (2d Cir. 1976), where appellate review was sought of pretrial discovery orders of documents assertedly protected by the attorney-client privilege, this Court reiterated its longstanding position against reviewability. We stated that in the absence of a 28 U.S.C. § 1292(b) certification, a persistent disregard of the Rules of Civil Procedure or a manifest abuse of discretion, interlocutory review of pretrial discovery orders would not be permitted. We also indicated that review might be allowed where the case presents legal questions of first impression or of extraordinary significance. The district judge has not certified this matter for appeal. Unless, therefore, the application to this Court satisfies one of the alternative requirements

for reviewability, we are bound by our prior decisions to deny review.

The question of informer privilege is, of course, not one of first impression. It is an ancient doctrine with its roots in the English common law, 3 *Russell on Crimes,* at 592–93 (6th ed. 1896), founded upon the proposition that an informer may well suffer adverse effects from the disclosure of his identity. Illustrations of how physical harm may befall one who informs can be found in the reported cases. *See, e.g., In Re Quarles,* 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 1080 (1895); *United States* v. *Toombs,* 497 F. 2d 88, 90 n.1 (5th Cir. 1974); *Swanner* v. *United States,* 406 F. 2d 716 (5th Cir. 1969); *Schuster* v. *City of New York,* 5 N.Y. 2d 75, 180 N.Y. S. 2d 265, 154 N.E. 2d 534 (1958). However, the likelihood of physical reprisal is not a prerequisite to the invocation of the privilege. Often, retaliation may be expected to take more subtle forms such as economic duress, blacklisting or social ostracism. *See Usery* v. *Local 720, Laborers' International Union of North America,* 547 F. 2d 525, 527 (10th Cir.), *petition for cert. denied;* —— U.S. ——, 97 S.Ct. 2649, 53 L.Ed. 2d 255 (1977); *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.,* 459 F. 2d 303, 306 (5th Cir. 1972); *Wirtz* v. *Continental Finance & Loan Co.,* 326 F. 2d 561, 563–64 (5th Cir. 1964); *Mitchell* v. *Roma,* 265 F. 2d 633, 637 (3d Cir. 1959); *Hodgson* v. *Keeler Brass Co.,* 56 F.R.D. 126, 127–28 (W.D.Mich.1972); 8 Wigmore, *Evidence* § 2374 at 762 (McNaughton Rev. 1961). The possibility that reprisals of some sort may occur constitute nonetheless a strong deterrent to the wholehearted cooperation of the citizenry which is a requisite of effective law enforcement.

Courts have long recognized, therefore, that, to insure cooperation, the fear of reprisal must be removed and that "the most effective protection from retaliation is the anonymity of the informer." *Wirtz* v. *Continental Finance & Loan Co., supra,* 326 F. 2d at 563–64; *see also McCrary* v. *Illinois,* 386 U.S. 300, 306–09, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967); *Usery* v. *Local 720, supra,* 547 F. 2d at 527. "By withholding the identity of the informer, the government profits in that the continued value of informants placed in strategic positions is protected, and other persons are encouraged to cooperate in the administration of justice." *United States* v. *Tucker,* 380 F. 2d 206, 213 (2d Cir. 1967). Congress, also, has recognized the importance of this protective measure. *See, e.g., United States* v. *Greenwood Municipal Separate School District,* 406 F. 2d 1086, 1089–1090 (5th Cir.), *cert. denied,* 395 U.S. 907, 89 S. Ct. 1749, 23 L. Ed. 2d 220 (1969).

The doctrine of informer privilege is applied in civil cases as well as criminal. *Wirtz* v. *Continental Finance & Loan Co., supra,* 326 F. 2d at 563, and limits the right of disclosure under Rule 34 of the Federal Rules of Civil Procedure. *Wirtz* v. *Robinson & Stephens, Inc.,* 368 F. 2d 114, 116 (5th Cir. 1966). Indeed, there is ample authority for the proposition that the strength of the privilege is greater in civil litigation than in criminal. See *United States* v. *Carey,* 272 F. 2d 492, 493 (5th Cir. 1959); *Mitchell* v. *Roma, supra,* 265 F. 2d at 637–38; *Black* v. *Sheraton Corp.,* 47 F.R.D. 263, 272 (D.D.C. 1969); *Bocchicchio* v. *Curtis Publishing Co.,* 203 F. Supp. 403, 407 (E.D. Pa. 1962). However, the privilege is

not absolute in either. Where the identification of an informer or the production of his communications is essential to a fair determination of the issues in the case, the privilege cannot be invoked. *Roviaro* v. *United States,* 353 U.S. 53, 60–61, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); *United States* v. *Alexander,* 495 F. 2d 552, 553 (2d Cir. 1974).

The burden of establishing the need for disclosure is upon the person who seeks it. *United States* v. *Prueitt,* 540 F. 2d 995, 1004 (9th Cir. 1976), *cert. denied,* 429 U.S. 1063, 97 S. Ct. 790, 50 L. Ed. 2d 780 (1977). This burden is not met by mere speculation that identification might possibly be of some assistance. *United States* v. *Prueitt,* 540 F. 2d at 1003; *United States* v. *D'Amato,* 493 F. 2d 359, 366 (2d Cir.), *cert. denied,* 419 U.S. 826, 95 S. Ct. 43, 42 L. Ed. 2d 50 (1974). Disclosure should not be directed simply to permit a fishing expedition, *United States* v. *Berrios,* 501 F. 2d 1207, 1211 (2d Cir. 1974); *Waldron* v. *Cities Service Co.,* 361 F. 2d 671, 673 (2d Cir. 1966), *aff'd sub nom. First National Bank* v. *Cities Service Co.,* 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968), or to gratify the moving party's curiosity or vengeance, *Shore* v. *United States,* 60 App. D.C. 137, 141 49 F. 2d 519, 523 (1931), but only after the trial court has made a determination that plaintiff's need for the information outweighs the defendant's claim of privilege. *Kerr.* v. *United States District Court,* 426 U.S. 394, 405, 96 S.. Ct. 219, 48 L. Ed. 2d 725 (1976).

District courts have the inherent power to hold *in camera* proceedings, *United States* v. *Hurse,* 453 F. 2d 128, 130–31 (8th Cir. 1971), *cert. denied,* 414 U.S. 908, 94 S. Ct. 245, 38 L. Ed. 2d 146 (1973), and this is a

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"highly appropriate and useful means of dealing with claims of governmental privilege." *Kerr* v. *United States District Court, supra,* 426 U.S. at 406, 96 S. Ct. at 2126. The district judge has made an *in camera* inspection of the eighteen files at issue but has refused to rule on their confidentiality. Instead, he has thrown them open to inspection by four attorneys representing the plaintiffs and has indicated his intention to permit similar inspection of additional files. It is the contention of the defendants that the district judge, in thus attempting to determine "whether the circumstances are appropriate for the claim of privilege", is in fact "forcing a disclosure of the very thing the privilege is designed to protect." *United States* v. *Reynolds,* 345 U.S. 1, 8, 73 S. Ct. 528, 532, 97 L. Ed. 727 (1953). Defendants assert that, if the purpose of the informer privilege rule is to encourage cooperation through the promise of anonymity, this purpose will be ill-served by a practice of delivering informants' files to opposing counsel. The district judge's ineffective direction that this procedure, which he had adopted, not be made public indicates that he was aware of the problem.

However, it is by now well-established that a district judge, in the exercise of his discretion, may permit opposing counsel to participate in and assist him in the conduct of *in camera* proceedings under a pledge of secrecy. *See, e.g., United States* v. *Nixon,* 418 U.S. 683, 715 n. 21, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); *United States* v. *Anderson,* 509 F. 2d 724, 729 (9th Cir.), *cert. denied,* 420 U.S. 910, 95 S. Ct. 831, 42 L. Ed. 2d 840 (1975). The order appealed from does not therefore create an issue of first impression or extraordinary signicance, nor was its issu-

ance an abuse of discretion which warrants appellate review.

We would be remiss, however, if we did not express our concern that the course upon which the district judge has embarked will lead to disclosure for which there is no substantial need, *Brennan* v. *Engineered Products, Inc.*, 506 F. 2d 299, 303 (8th Cir. 1974), and to unnecessary rummaging in government files. *Taglianetti* v. *United States*, 394 U.S. 316, 317, 89 S. Ct. 1099, 22 L. Ed. 2d 302 (1969); *Donohoe* v. *Duling*, 330 F. Supp. 308, 312 (E.D. Va. 1971), *aff'd*, 465 F. 2d 196 (4th Cir. 1972). Although disclosure in small servings effectively precludes appellate review, it does not make the end result more palatable to either the defendants or the public. As has been well said, "the general disclosure of informants' identities to defense counsel is likely to compromise the fundamental public policy underlying the [informer] privilege." Levine, *The Use of In Camera Hearings in Ruling on the Informer Privilege*, 8 U. Mich. J. L. Ref. 151, 171 (1974).

Defendants argue forcibly that plaintiffs have no valid cause of action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.*, or the Constitution and rely in addition upon the two year statute of limitation contained in 28 U.S.C. § 2401(b) as a valid defense. These issues are not now before us but will be determined by the district court on the trial. However, the identification of informants, once made, will be irreversible on an appeal from the final judgment. *Metros* v. *United States District Court*, 441 F. 2d 313, 315 (10th Cir. 1971). As this Court stated when this case was before it on a prior appeal, the district court should weigh "the serious prejudice to the

Government from compromising some or all the informants for all time, even though the final determination of the action may be for the defendants." *Socialist Workers Party* v. *Attorney General*, 510 F. 2d 253, 257 (2d Cir. 1974).

We are far from convinced that plaintiffs' attorneys require a wholesale disclosure of informants' identities in order to prepare their case for trial.[4] The activities of the informants have been extensively disclosed in the discovery already had, and most of the other proof necessary to establish plaintiffs' claim is already in plaintiffs' possession. In this case, which probably will be tried without a jury, *see O'Connor* v. *United States*, 269 F. 2d 578, 585 (2d Cir. 1959), a decision as to the need for discovery of much privileged matter can be deferred safely until more fundamental issues, perhaps dispositive of the need, are decided on trial. See *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689, 697, 53 S. Ct. 736, 77 L. Ed. 1449 (1933); *Usery* v. *Local 720, supra*, 547 F. 2d at 528; *Ellingson Timber Co.* v. *Great Northern Ry. Co.*, 424 F. 2d 497, 499 (9th Cir.), *cert denied*, 400 U.S. 957, 91 S. Ct. 354, 27 L. Ed. 2d 265 (1970); *United States* v. *Schine Chain Theatres*, 4 F.R.D. 108, 109 (W.D. N.Y. 1944).

In summary, although some other circuits have taken a more liberal position with regard to the re-

[4] Moreover, while we share the trial judge's confidence in the character and integrity of plaintiffs' counsel, we are less sanguine than he concerning their ability to conceal the information which is about to be disclosed to them. Indeed, unless counsel are prohibited from making use of the information thus obtained, the very thrust of their future inquiries may point interested observers directly to many of the individuals involved.

viewability of interlocutory orders of the type involved herein, *see, e.g., Usery* v. *Ritter*, 547 F. 2d 528, 532 (10th Cir. 1977); *Metros* v. *United States District Court, supra*, 441 F. 2d at 315, we are bound to follow this Court's strong policy against review. However, as in *Baker* v. *United States Steel Corp.*, 492 F. 2d 1074 (2d Cir. 1974), we are hopeful that the district judge will give full consideration to the thoughts here expressed.

Appeal dismissed and application of writ of mandamus denied.

DOOLING, District Judge.

I concur in the result.

APPENDIX D

Opinion of District Court
June 30, 1978

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 73 Civ. 3160

SOCIALIST WORKERS PARTY et al.,

Plaintiffs,

v.

ATTORNEY GENERAL OF THE UNITED STATES et al.,

Defendants.

• • • • •

Leonard B. Boudin, Rabinowitz, Boudin & Standard, New York City, Margaret Winter, Mary B. Pike, New York City, for plaintiffs.

Robert B. Fiske, Jr., U.S. Atty. for the Southern District of New York, New York City, Thomas E. Moseley, Stuart I. Parker, Frank H. Wohl, Asst. U.S. Attys., New York City, for defendants Attorney General of the United States, Director of the Federal Bureau of Investigation, et al.

OPINION

GRIESA, *District Judge.*

This is an action brought by two related political organizations, the Socialist Workers Party ("SWP") and the Young Socialist Alliance ("YSA"), and members of these organizations, claiming that various agencies and officials

of the federal government have violated plaintiffs' constitutional and other legal rights.

Plaintiffs have moved under Fed.R.Civ.P. 37(b)(2)(D) to adjudge the Attorney General of the United States in contempt for failure to obey an order of this Court of May 31, 1977. The latter order directed defendant Federal Bureau of Investigation to produce to plaintiffs' counsel the files of eighteen FBI informants, with the express direction that plaintiffs' counsel were prohibited from revealing the identities of the informants or any other information contained in the files to anyone other than the attorneys specified in the order.

The Second Circuit Court of Appeals, in an opinion dated October 11, 1977, held that the May 31, 1977 order was issued within the District Court's lawful discretion. *In re United States*, 565 F.2d 19 (2d Cir. 1977). A petition for rehearing to the Court of Appeals, with a suggestion for rehearing *en banc*, was denied on March 9, 1978, no active judge, or judge who was a member of the panel, voting for rehearing. On June 12, 1978 the Supreme Court denied the Government's certiorari petition, Chief Justice Burger and Justices White and Powell announcing they would grant the petition.

Although the order was directed to the FBI, the Attorney General has now assumed the personal responsibility for deciding whether or not the order is to be complied with. The Attorney General asserts that this assumption of responsibility is required by 28 C.F.R. §§ 16.23 and 16.24(b).

In an affidavit dated June 13, 1978, confirmed by subsequent submissions made to the Court by the United States Attorney for the Southern District of New York, the Attorney General has stated that he will not comply with the order of May 31, 1977, and that neither the Department of

Justice nor the FBI will produce the informant files specified in that order.[1]

The Attorney General makes the following arguments in opposition to a finding of contempt:

> (a) That it would be a grave and almost unprecedented step to hold a cabinet officer in contempt of court, particularly for failure to comply with a discovery order;
>
> (b) That his refusal to obey the order stems from a desire to protect an important public interest—*i.e.*, the need to ensure the confidentiality of informants so that informants will not be deterred from assisting in the detection of crime;
>
> (c) That his refusal to obey the order has the further purpose of preserving the Government's right to obtain "full appellate review" of the May 31, 1977 order, which he declares is thus far "unreviewed."
>
> (d) That the Court should refrain from enforcing the May 31, 1977 order, and should impose sanctions other than contempt—*i.e.*, adopt methods of dealing with the informant issues that do not involve production of the actual informant files to plaintiffs' counsel.

This Court cannot accept the Attorney General's position. No one can deny that it is a grave step to enforce a

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[1] The Attorney General would consent to produce four of the files, involving informants who have agreed that their identities may be revealed. However, since the Attorney General would produce these four files only in somewhat expurgated form, there would not be full compliance with the May 31, 1977 order even as to the four files; and there is a total refusal to produce the other fourteen files.

court order to the extent of holding the Attorney General of the United States in contempt. However, the issues in this case are grave in the extreme, involving charges of abuse of political power of the most serious nature. Plaintiffs allege, among other things, that the FBI used its very considerable power to conduct a systematic covert campaign to manipulate and disrupt the plaintiff organizations and interfere with their lawful activities. Plaintiffs allege that a prime device used in this campaign was to infiltrate the plaintiff organizations with paid, undercover informants, who were instructed to take various actions designed to harm the organizations, and to furnish the FBI information so that the FBI could take additional steps to harass and hamper the organizations and their members. Plaintiffs also allege that, aside from this campaign to manipulate and disrupt, there was a serious invasion of constitutional rights in the very fact of the pervasive intrusion and surveillance carried out by the undercover informants with respect to the peaceful political activities of the organizations and the personal lives of members, accompanied by the use of these informants to obtain all manner of confidential documents, including membership lists and financial records.

Plaintiffs urge that the activities of the FBI informants were of a radically different character than legitimate use of informants for valid law enforcement purposes. Plaintiffs contend that there was no valid law enforcement or crime-detection purpose involved in the FBI surveillance and the other activities carried out by the FBI against the SWP, the YSA and their members. In this connection, it should be noted that in September 1976, some three years after this action had been commenced, and after a Senate

committee[2] had severely criticized the FBI with respect to its activities against the SWP and the YSA, Attorney General Levi terminated the investigation of the SWP.

It is not only in plaintiffs' interest, but in the broad public interest, that plaintiffs be afforded a fair opportunity to obtain and present the essential evidence about this alleged wrongdoing. The issues in this case relate to the most fundamental constitutional rights, which lie at the very foundation of our system of government—the right to engage in political organization and to speak freely on political subjects, without interference and harassment from governmental organs. Since the allegations relate to the highest levels of government,[3] it is entirely appropriate for a court to enter an order against a cabinet officer, if necessary, for the production of the essential evidence, and to adjudge that cabinet officer in contempt if he refuses to obey the order.

For reasons to be explained hereafter, this Court concludes that the FBI informant files constitute a unique and essential body of evidence regarding the allegations of wrongdoing in this case. The Court further concludes that, although it is neither necessary nor practical to have all such files (numbering over 1300) produced or used as evidence, it must be established as a principle in the conduct of this case that plaintiffs' counsel are entitled to production of a representative selection of these informant files,

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[2] Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Final Report, S. Rep. No. 94-755, 94th Cong., 2d Sess. (4 volumes 1976).

[3] No allegation has been made as to any personal wrongdoing by the present Attorney General, Griffin B. Bell. The basic allegations in the case relate to periods of time before Mr. Bell took office. One former Attorney General, John Mitchell, has been named personally as a defendant. Moreover, the Attorney General of the United States is named as a defendant by title.

without deletions or expurgations—such production to be decided upon *by the Court*, and not to depend upon the unilateral terms and conditions set by the FBI or the Attorney General. In this regard, the following discussion in *Rosee* v. *Board of Trade*, 35 F.R.D. 512, 515 (N.D.Ill.1964) is instructive:

> "Unless the privilege is conferred by statute, the legitimacy of the privilege claimed must be determined by the Court. 'Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.' *United States* v. *Reynolds*, 345 U.S. 1, 9, 73 S.Ct. 528, 97 L.Ed. 727 (1953).
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> • • •
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> "Without statutory authority, an executive officer may not erect a privilege which will bar judicial scrutiny. To allow such action, particularly where government agents are numbered among the defendants, would enable such an officer (here, the Secretary of Agriculture) to draw a cloak of secrecy around the acts of subordinates and thereby preclude ultimate determination of the propriety of their official conduct."

Plaintiffs' request for eighteen informant files is unquestionably a good faith effort to arrive at a representative selection of the files. In view of the total number of such files in existence, it is a most modest request indeed. Although the Court has granted the request for production, it has imposed certain important conditions over plaintiffs' objections. The Court has ordered that the information in the files is only available to plaintiffs' attorneys, and cannot be revealed even to the clients except to the extent expressly authorized by the Court in further proceedings.

The Attorney General's assertion that the public interest requires ensuring the confidentiality of informants is a reiteration of the position taken by the FBI throughout these proceedings. This Court has consistently recognized the need to give the matter of the confidentiality of informants the most careful consideration. It has been the purpose of the Court, often expressed, to handle the case in such a way as to keep any public exposure of the identities of FBI informants to an absolute minimum.[4] However, the informant privilege is not absolute. *Roviaro* v. *United States*, 353 U.S. 53, 60-61, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). The Government's interest must be weighed against other factors. One factor here is that there is no ongoing investigation of the SWP or the YSA which will be compromised by the production of informant files. Thus, the Government is asserting a "generalized interest in confidentiality (*see United States* v. *Nixon*, 418 U.S. 683, 713, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974))—that is, the concern that informants in other situations may be deterred if confidentiality is not maintained in the present case. Of greater significance is the fact that this is *not* the normal situation where the problem is the disclosure of information relating to informants who have unquestionably been used in legitimate efforts to detect crime. The present case involves the serious allegation that the FBI informants were used for *unlawful* purposes—that is, to monitor and interfere with legitimate political and private activities. Thus

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[4] The Court ordered that the *procedure itself* for producing files to plaintiffs' attorneys should not be revealed except as expressly authorized by the Court. It should be noted that the latter direction was strictly obeyed by plaintiffs' attorneys. No word about the procedure was revealed or leaked by them. The only disclosure of the procedure came after the FBI sought review in the Court of Appeals, and the Court of Appeals ordered the matter unsealed.

the questions about production of informant files in the present case cannot be resolved by looking solely at the interest in informant confidentiality, as the Government would have us do. There are countervailing considerations which deeply affect the public good. These considerations relate to the interest of the citizens of this country in being protected against the illegal and unconstitutional use of informants to interfere with the exercise of basic political rights and to invade the privacy of persons and organizations. One obvious way to protect against such abuses is to allow private plaintiffs fair opportunity to recover for such abuses to the extent legally allowed, with the attendant exposure of any misuse of Government power to public view. These considerations reinforce the conclusion that there is ample justification for the enforcement of an order against the Attorney General which is designed to provide essential evidence in this case to plaintiffs' attorneys.

The discussion in *United States* v. *Hemphill*, 369 F.2d 539, 542 (4th Cir. 1966) is instructive. There the Government was a plaintiff, and the Court of Appeals granted a writ of mandamus against a district court order compelling disclosure of certain Government informant files. However, the Court of Appeals emphasized that in certain instances the informant privilege would need to give way to other interests relating to the administration of justice. The discussion of the Court, while relating to the Government as a plaintiff, has application to the Government as a litigant in any capacity.

> "[T]he policy favoring anonymity of informants must give way when it conflicts with the countervailing policy favoring fair and orderly trials and pretrial procedures.

> "This was the concern of the District Judge. We share his conviction that when the United States, a cabinet official, or an agency of the United States comes into the Court as a plaintiff, they are subject to the same rules as private litigants, and the open disclosure which is now demanded of litigants in the federal courts, because of its fairness and its contribution to accuracy in the factfinding process, is equally demanded of such plaintiffs."

A principal justification asserted by the Attorney General for his refusing compliance with the May 31, 1977 order is that such refusal is necessary in order to preserve the right to "full appellate review." The Attorney General contends that the Government has been unable to obtain "review on the merits with respect to the Court's order" in the appellate proceedings which have taken place.

The theory that full appellate review has thus far been denied, and that there is some other procedure which will provide an additional quantum of review is repeated over and over again in the Attorney General's affidavit and in the brief filed on his behalf. However, this proposition is simply invalid.

At no point in the Attorney General's affidavit or in his brief is there any attempt to articulate or explain what additional measure of review would be available through some other appellate proceeding. Not one judicial authority is cited to illustrate or define what further appellate review would add or accomplish.

As will be described more fully hereafter, the Court of Appeals dismissed the appeal, *but* entertained and ruled upon the mandamus petition. This ruling expressly resolved each relevant question of law—that is, that the in-

formant privilege applies; that it is a qualified privilege, which can be overcome by a showing that the need for disclosure outweighs the claim of privilege; and that a district judge, in the exercise of his discretion, may permit opposing counsel to participate in and assist him in the conduct of *in camera* proceedings under a pledge of secrecy. Finally, the Court of Appeals held that the May 31, 1977 order was a valid exercise of discretion under these rules. *In re United States*, 565 F.2d 19, 22-23.

This review responded precisely to the "Question Presented" in the Government's brief relating to the mandamus petition and appeal to the Second Circuit, which was phrased:

> "Whether the District Court abused its discretion in directing release to plaintiffs' counsel of eighteen confidential informants' identities and files in a civil action against the Government."

The Government regarded this same question as the proper question both for mandamus petition and appeal.

The problem, from the Government's standpoint was not that the Court of Appeals failed to rule on the issues, but that the Court ruled adversely to the Government.

The authorities are absolutely clear that, in connection with a discovery problem such as the one involved in the present case, the issue on appellate review, regardless of the form such review takes, is the question of whether the district court abused its discretion. Thus, no additional measure of review would be available to the Government in this case in any further proceedings in the appellate courts. *Baker* v. *F & F Investment*, 470 F.2d 778, 781 (2d Cir. 1972), *cert. denied*, 411 U.S. 966, 93 S.Ct. 2147, 36 L.Ed.

2d 686 (1973); *Carr* v. *Monroe Manufacturing Co.*, 431 F.2d 384, 389 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000, 91 S.Ct. 456, 27 L.Ed.2d 451 (1971); *Swanner* v. *United States*, 406 F.2d 716, 718-19 (5th Cir. 1969). The Government was asked at oral argument to provide decisions illustrating its theory that there would be a broader review of the Court's discovery ruling on appeal than was afforded on mandamus. The Government then provided the Court with a group of cases. These cases are either off point, or illustrate the opposite of the Government's theory. *See Duplan Corp.* v. *Deering Milliken, Inc.*, 540 F.2d 1215 (4th Cir. 1976); *Carey* v. *Hume*, 160 U.S.App.D.C. 365, 492 F.2d 631, *cert. dismissed*, 417 U.S. 938, 94 S.Ct. 2654, 41 L.Ed.2d 661 (1974); *Hyde Construction Co.* v. *Koehring Co.*, 455 F.2d 337 (5th Cir. 1972); *Garner* v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971); *Radiant Burners, Inc.* v. *American Gas Association*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929, 84 S.Ct. 330, 11 L.Ed.2d 262 (1963); *Hyam* v. *American Export Lines, Inc.*, 213 F.2d 221 (2d Cir. 1954).

The Attorney General goes so far as to contend that he would be justified in disobeying the May 31, 1977 order even if it meant his being held in civil contempt, because this would be a legitimate device for obtaining "full appellate review." The argument about the availability of fuller review has been dealt with. Moreover, it is the settled rule that a party to a civil case does not have a right of appeal from a civil contempt citation until final judgment. *Fox* v. *Capital Co.*, 299 U.S. 105, 107-08, 57 S.Ct. 57, 81 L.Ed. 67 (1936); *International Business Machines Corp.* v. *United States*, 493 F.2d 112, 117-19 (2d Cir. 1973), *cert. denied*, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974);

Hodgson v. *Mahoney*, 460 F.2d 326, 328 (1st Cir.), *cert. denied*, 409 U.S. 1039, 93 S.Ct. 519, 34 L.Ed.2d 488 (1972).

The Attorney General argues that he has a kind of option to accept sanctions under Rule 37 short of compliance with the order. The sanctions suggested by the Attorney General, which will be analyzed hereafter, are nothing but attempts to avoid or drastically reduce the effect of the May 31, 1977 order. In other words, the Government seeks to use the weapon of defiance of the order to dictate its own terms as to what it will or will not do in connection with providing evidence in this case.

This position cannot be justified. The Attorney General has no "right" to defy a court order for discovery, and accept sanctions of his selection. *United States* v. *Costello*, 222 F.2d 656, 662 (2d Cir. 1955), *rev'd on other grounds sub nom. Matles* v. *United States*, 356 U.S. 256, 78 S.Ct. 714, 2 L.Ed.2d 741 (1958); *Edgar* v. *Slaughter*, 548 F.2d 770, 772 (8th Cir. 1977). On the contrary, his duty is to obey the order. The Court possesses, and must possess under our system of law, the authority to enforce an order for the production of evidence, with a view to the interests of all parties in a litigation, and with a balanced view of the public interests involved. The Court must not fashion its orders and remedies solely at the behest of any one party, even if he is the Attorney General of the United States.

Rule 37(b)(2)(D) of the Federal Rules of Civil Procedure expressly provides for contempt of court as a sanction which may be imposed in lieu of, or in addition to, other sanctions.

In *Bank Line* v. *United States*, 163 F.2d 133, 138 (2d Cir. 1947), Judge Augustus Hand, writing for Judges Learned Hand and Clark, stated:

> "It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institutions."

The Government asserts that the Attorney General's refusal to comply with the May 31, 1977 order is made in the utmost good faith. While this Court does not doubt for a minute the Attorney General's sincere interest in protecting legitimate informant confidentiality, the effect of the Government's position at this juncture in the present proceedings is to create unjustified delay and obstruction to the production of evidence in a case involving serious charges of illegal use of informants. In any event, the good faith motive of a party does not justify disobedience of a court order. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed 599 (1949); *Sawyer* v. *Dollar*, 89 U.S.App.D.C. 38, 48, 190 F.2d 623, 633 (1951), *vacated as moot*, 344 U.S. 806, 73 S.Ct. 7, 97 L.Ed. 628 (1952). For instance, in a case recently tried by this Court, the Department of Justice obtained a civil contempt citation and then a conviction for criminal contempt of a young woman who refused to give testimony when ordered to do so by the court, despite the fact that the refusal resulted from the woman's honest and reasonable belief that she would be killed if she testified. *United States* v. *Alpert*, 76 Cr. 497 (S.D.N.Y. Oct. 6, 1977).

It is time for the May 31, 1977 order to be complied with. It is a modest order, which recognizes the legitimate interests of both plaintiffs and the Government, and it takes into account both the public interest in informant confi-

dentiality and the public interest in exposing illegal uses of informants and abuses of governmental police power. Compliance with this order is an essential prerequisite to the further conduct of this litigation. The order is far short of anything approaching "wholesale" revelation of informant files or identities. To repeat, it requires disclosure of eighteen (out of 1300) informant files to plaintiffs' counsel on a confidential basis. Although the Court of Appeals expressed concern about possible excessive disclosure which might occur in the future (which concern the District Court will unquestionably heed), the opinion contained no reservation whatever about the propriety of the present order. The order has been the subject of a year of appellate review. It must now be enforced.

The Supreme Court has emphatically affirmed the power and the duty of the Judiciary to declare the law in connection with claims of governmental privilege asserted by the highest officials in the country. The Supreme Court has affirmed the power of the Judiciary to enter an order for the production of evidence even against the President of the United States. *United States* v. *Nixon*, 418 U.S. 683, 704-05, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Surely these rules apply to a cabinet officer.

The power to enter an order against an official necessarily implies the power to enforce that order by appropriate means, including holding the official in contempt of court. *Sawyer* v. [illegible]*ar*, 89 U.S. App.D.C. 38, 190 F.2d 623 (1951), *vacated as moot*, 344 U.S. 806, 73 S.Ct. 7, 97 L.Ed. 628 (1952). There the Secretary of Commerce, the acting Attorney General, and other high officials were held in civil contempt for failure to obey a court order and for counseling disobedience of the order. This order was made at the conclusion of litigation. However, the principle regarding

the applicability of civil contempt in cases of disobedience of court orders by cabinet officers applies with equal force in the present case.

In the *Sawyer* case, the Court held the officials in civil contempt, granted a short time during which they could purge themselves of contempt and avoid imprisonment, and ordered that they should surrender themselves for imprisonment if they did not purge themselves of contempt within the specified period. The officials complied, and imprisonment was unnecessary.

In view of the factual record, and in light of the applicable authorities, the Court rules:

> (a) The order of May 31, 1977 remains in force, and the Attorney General and the FBI are hereby given notice that they are to comply with that order, and to produce the files as directed, forthwith. In order for the Attorney General and his advisors to have an opportunity to review this opinion, it will be deemed to be compliance with the order if the files are produced to plaintiffs' counsel by 5:00 p.m. July 7, 1978. If such production is made at or before that time, the Attorney General will not be in contempt.
>
> (b) If the production of the files is not made at or before the time specified, the Attorney General will be in civil contempt of court thereafter, until he purges himself of contempt by directing the production of the files.

At this time the Court declines plaintiffs' request for an order of imprisonment. The authorities hold that, in connection with civil contempt, the minimum sanction necessary to obtain compliance is to be imposed. *Shillitani* v. *United States*, 384 U.S. 364, 371, 86 S.Ct. 1531, 16 L.Ed.2d

622 (1966); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450-51, 31 S.Ct. 492, 55 L.Ed. 797 (1911). The announcement by the Attorney General that he will not comply with the court order justifies, and indeed necessitates, specific notice to the Attorney General that he will be in civil contempt of court if he continues in this non-compliance. It is obvious that the status of civil contempt would, in and of itself, be a severe sanction against the highest law enforcement officer in the United States. The Court earnestly hopes that the Attorney General will now carry out the order, and that contempt will be entirely avoided. If this does not occur, and if the Attorney General is in civil contempt and makes no effort to purge himself, the Court will entertain a motion for more drastic sanctions.

II.

This action was commenced in July 1973. The plaintiffs consisted of the Socialist Workers Party, the Young Socialist Alliance, and certain named members of these organizations. Although originally brought as a class action, subsequent pleadings have dropped the class allegations. The original complaint named as defendants, by title, the Attorney General of the United States, the Director of the Federal Bureau of Investigation, and other governmental officials.

Certain persons were named as defendants individually, including former Attorney General John Mitchell. The list of defendants included "Unknown Agents of the United States Government." No official or employee of the FBI was individually named as a defendant.

The original complaint alleged, with varying degrees of specificity, wrongs committed by members of the federal

government designed to interfere with the rights of plaintiffs under the federal Constitution and certain federal statutes. Injunctive relief was requested. In addition, claims for damages were asserted against the specifically named individual defendants and the "Unknown Agents".

The United States of America was not named as a defendant in the original complaint.

All the individual defendants named in the original complaint were dismissed from the action for lack of personal jurisdiction, except Richard M. Nixon, John Mitchell and John W. Dean, III. A motion for dismissal has been made on behalf of defendant Nixon but decision has been deferred. The various defendants who have not moved for dismissal have denied liability.

The basic issues in the case revolve around the following positions, which are summarized here very briefly. Plaintiffs contend that they are peaceful political organizations devoted to socialism, and also devoted to various lawful causes such as civil rights, women's liberation, and the anti-Vietnam War movement. Plaintiffs' socialist philosophy appears to have its genesis in the teachings of Leon Trotsky. Plaintiffs contend that, despite this Marxist philosophical connection, they have a long record of peaceful pursuits, totally inconsistent with violence or crime. Defendants basically take the position that many, if perhaps not all, of the investigations or other activities carried out vis-à-vis the SWP and the YSA were justified by the need to guard against Marxist revolutionary tactics, including violence and crime.

As noted earlier, in September 1976, Attorney General Levi directed the FBI to terminate its "investigation" of the SWP (presumably including the YSA). The Attorney General's memorandum of September 9, 1976 to the Director of the FBI stated in part:

> "The information presented by the FBI and CIA does not constitute specific and articulate facts giving reason to believe the Socialist Workers Party will engage in violence in the foreseeable future; thus the standard set by the domestic security guidelines has not been met. There is no evidence of conduct that would justify an investigation under the foreign counterintelligence guidelines. . . . This type of information should be carefully watched to see whether in the future a reconsideration of this case is required. Similarly, if new facts or circumstances emerge which change the character of the group's domestic conduct in such a way as to justify investigation, a reconsideration would be in order."

The discovery process in this case has been unusually complex for a variety of reasons. The Government has admitted that it possesses about 8,000,000 documents relating to the SWP, the YSA, and their members. All parties have endeavored to be as selective as possible regarding document discovery, so as to avoid involving millions of documents in discovery and evidence at trial. So far about 65,000 pages of documents have been produced by the Government—less than one percent of the total.

In general, the various Government agencies have been cooperative, and appear to have been candid, in responding to discovery requests. The United States Attorney's staff is entitled to special commendation for their efforts in connection with the discovery in this case.

However, certain instances of misrepresentations by the FBI in connection with discovery have occurred. These unfortunate instances furnish some plausibility for plaintiffs' assertion, in connection with their request for informant files, that they need at least a representative sample of actual, complete files, and that they should not be relegated to summary information or expurgated documents prepared for them by the Government.

One critical instance where the FBI was less than candid occurred in connection with plaintiffs' first set of interrogatories directed to the FBI. These interrogatories were served in December 1973. By the time of these interrogatories plaintiffs had obtained, among other things, a copy of a memorandum dated April 28, 1971 from the Director of the FBI announcing the discontinuance of certain "counterintelligence programs"—including programs entitled "COINTELPRO—New Left" and "Socialist Workers Party—Disruption Program."[5] The FBI furnished sworn answers to the interrogatories February 5, 1974. These answers stated, among other things, that COINTELPRO—New Left was not applicable to either the SWP or the YSA; and that the purpose of the Socialist Workers Party—Disruption Program "was to alert the public to the nature and activities of the Socialist Workers Party and thus to neutralize the Socialist Workers Party." The answers further described the tactics employed in the Socialist Workers Party—Disruption Program as consisting of the furnishing of information to law enforcement agencies regarding violations of the law by SWP and YSA members; furnishing the news media pertinent information regarding the objectives and activities of these organizations, and furnishing "information concerning the nature and activities of SWP and YSA to organizations and individuals associated with SWP, YSA or their members."

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[5] This memorandum was presumably among the materials obtained in October 1973 by NBC newsman Carl Stern from the FBI under the Freedom of Information Act.

In March 1975 the FBI produced documents which showed that COINTELPRO—New Left was in part directed to the SWP and YSA. The documents showed FBI plans and activities of both COINTELPRO—New Left and Socialist Workers Party—Disruption Program which were far different from the bland descriptions in the answers to interrogatories. The documents indicate that the purpose of the FBI in these programs was to destroy or cripple the SWP and YSA by a host of covert means—to isolate the SWP and YSA from sympathetic organizations, to turn members against one another, and to impose burdens and barriers to the functioning of the SWP, the YSA and their members. These are activities which are not countenanced in the prosecution and punishment of actual criminals, under our system of government.

The documents show FBI plans to place informants within the SWP and YSA to split the organization structure and foment dissent. According to the documents, the FBI interfered with travel reservations of members, took steps to cause speaker hall rentals to be canceled, and circulated false information about the times and places of meetings. The documents show that the FBI caused local law enforcement officers to make arrests and break up functions, not for the purpose of assisting in the enforcement of local laws, but for the purpose of disrupting the SWP and YSA. In one instance, the FBI arranged for a raid of a SWP summer camp for alleged state law violations, and considered it a success when the SWP was forced to sell the camp property. According to the documents, the FBI attempted to secure the eviction of the Philadelphia SWP office from a public building. The documents show that the FBI sent fraudulent letters, purporting to be from "distraught parents," to school administrators, in order to induce these administrators to discharge SWP or YSA members from teaching positions. According to the documents, the FBI sent and circulated a wide variety of communications and leaflets, purporting to be in the name of various individuals and organizations, and designed to create hostility and dissension within the SWP and YSA, and isolate these organizations from other allied organizations. It appears that in some cases informants directly participated in the carrying out of the disruption activities. In other instances the informants furnished the FBI with information which enabled regular agents of the FBI to conduct the disruption activities. The observations of the informants assisted the FBI in assessing the success or failure of disruption activities.

In the fall of 1974 plaintiffs made a motion for a preliminary injunction to prevent FBI informants from attending the national convention of the YSA to be held December 28, 1974. The District Court granted the injunction. *Socialist Workers Party* v. *Attorney General,* 387 F.Supp. 747 (S.D.N.Y.1974) . The Court of Appeals reversed, 510 F.2d 253 (2d Cir. 1974). With regard to the issue of whether the use of FBI informants violated plaintiffs' rights the Court of Appeals noted:

> "Such an issue deserves treatment *on a full record* and with ample time for reflection, initially by the district court, later by this Court, and perhaps ultimately by higher authority."
> 510 F.2d at 256 (emphasis added).

In May 1976 lengthy conferences were held to attempt to organize the remaining discovery problems, which were complex. A list of eleven alleged illegal activities was

arrived at which were agreed to constitute the basic types of illegal activities claimed by plaintiffs to have been engaged in by defendants. The list was as follows (Minutes May 14, 1976, pp. 75, 84-85):

1. Break-ins and unauthorized seizure or retention of property.
2. Electronic surveillance.
3. Consensual monitoring by recording devices.
4. Use of informants.
5. Physical surveillance.
6. Undercover surveillance.
7. Mail covers.
8. Mail intercepts.
9. Interviews by FBI agents of organization members and third persons.
10. COINTELPRO or disruption program.
11. Placing plaintiff organizations and their members on lists of security risks.

There was considerable discussion in May 1976 about the problem of discovery of the informant files. The Government attorney announced the Government would claim privilege as to these files. However, the Government attorney acknowledged what was and is abundantly clear—that the issues relating to the FBI informants are crucial, and indeed may be the most significant part of the case (Minutes May 4, 1976 pp. 131, 133). The Government at that time requested that the issue of discovery as to the

informant files be deferred. The request was that the discovery process on the informant issue be taken step by step.

Shortly before this discussion, plaintiffs had served a set of interrogatories specifically directed to the question of informants. It was agreed that answers to the interrogatories would be made first and that thereafter the parties and the Court could deal with the question of what document discovery would be necessary and appropriate on the informant issue (Minutes of May 4, 1976 pp. 132, 145).

In response to these interrogatories, the FBI furnished certain information pertaining to each of the 1331 informants which the FBI said it had used since 1960. Each informant was identified only by code number. Information of a rather general nature was given, not including names or localities, or specific descriptions of activities sufficient to identify the informants.

In May 1976 plaintiffs filed an amended complaint.[6] This complaint joined the United States of America as a defendant, and asserted claims for damages against the United States under the Federal Tort Claims Act. The amended complaint also joined three FBI agents, who were alleged to have been responsible for burglaries against plaintiffs' premises. On July 8, 1976 a second amended complaint was filed, making certain changes in the prayer for relief.

On May 7, 1976 the Government filed a motion which in effect sought to strike any claim for damages against the United States. The basic contentions of the Government were (1) that the claims pleaded by plaintiffs against the

[6] Shortly before this the FBI had produced in this action documents which appear to relate to over 90 burglaries committed by the FBI against the SWP in New York, New Haven and Los Angeles.

United States were not valid claims under any state law, and that therefore they did not form a basis for recovery under the Tort Claims Act; and (2) that plaintiffs had not complied with the requirement of 28 U.S.C. § 2401(b) that a claimant under the statute must present his claim in writing to the appropriate federal agency within two years after such claim accrues.

This motion was extensively briefed and argued. This Court denied the motion on July 29, 1976, ruling that a factual record needed to be developed both on the nature of the causes of action and their times of accrual. However, the Court stated that it would entertain an application for a preliminary trial relating to these issues. It should be noted that, although the Government thereafter repeatedly urged that discovery of informant files was unnecessary since any damage cause of action relating to the use of informants was precluded as a matter of law, the Government did not make any request for a preliminary trial until October 1977, after the Court of Appeals had denied the Government's appeal and mandamus application in respect to the informant files. It should be noted that the Court of Appeals opinion made no suggestion of any preliminary or truncated trial as a predicate to the production of the eighteen informant files.

Following the Court of Appeals opinion, this Court made a thorough review, for the second time, of the arguments of the Government that the damage claims against the United States should be dismissed as a matter of law, and ruled that there could be no such dismissal (Minutes November 3, 1977 pp. 2-15).

It is now necessary to return to the summer of 1976, and to the immediate background of plaintiffs' motion for the

production of nineteen informant files, the issue on this motion later being reduced to eighteen files because of the voluntary production of one file.

In the summer of 1976 one Timothy Redfearn was arrested by the Denver police. It was quickly revealed that he was an FBI informant against the YSA, and that, among other things, he had committed burglaries of YSA premises. It was apparent that the FBI had full knowledge of these burglaries. Finally, it was clear that the FBI had intentionally falsified the answers to interrogatories to conceal the fact of the burglaries.

Shortly thereafter plaintiffs moved for the production of the informant file on Redfearn and the files on six other informants whose identities had, in one way or another, been revealed to plaintiffs. Following an examination of these files, in August 1976, plaintiffs moved for production of nineteen other informant files. These related to informants whose identities were not known, but who were indicated in the interrogatory answers by number, accompanied by a limited description which was used by plaintiffs as a basis for their selection. Plaintiffs asserted, as reasons for this motion, (1) that the interrogatory answers, particularly in view of the indication of falsification, were inadequate to provide sufficient discovery and evidence on the FBI informant issue; (2) that the seven files of informants whose identities had become known were not sufficiently representative and were inadequate to provide discovery and evidence on the issue; (3) that, without waiving the right to request additional informant files, plaintiffs had made what they hoped was a representative selection of present and former member informants, informants who had engaged in significant activities, and certain non-member informants.

The FBI opposed the motion on the ground of informant privilege. As already noted, the Attorney General terminated the investigation of the SWP and YSA on September 9, 1976, so that thereafter there was no investigation which could be compromised by the production of the informant files. However, the FBI asserted that it owed the duty of confidentiality to the informants to protect them from embarrassment and harm, and that the maintenance of confidentiality was essential to avoid problems with informants in other investigations present and future. As already described, the FBI argued that there was no showing of necessity on the part of plaintiffs sufficient to overcome the interest in informant confidentiality, because plaintiffs' damage claims were legally invalid.

The Government's arguments were made without relation to the contents of the files in question. However, the Court directed the production of files *in camera* for analysis by the Court. Due to the great bulk of files, the Court requested the Government to prepare detailed summaries of the files, which was done. Neither the files nor the summaries were made available to plaintiffs' counsel.

To return to the subject of the interrogatory answers—following the revelation of false answers in connection with the informant Redfearn, the FBI undertook a review of the answers as a whole. On October 8, 1976, the FBI filed amendments to the answers relating to 22 of the informants. A special review at FBI headquarters in Washington was made with respect to the answers to interrogatories filed with respect to the eighteen informants whose files were the subject of plaintiffs' motion. This review resulted in amendments to the interrogatory answers in ten instances, filed October 15, 1976. Under the circumstances, there inevitably remains some question as to the accuracy and

completeness of the interrogatory answers as to the FBI informants.

While the motion regarding the FBI informant files was pending, two other motions raising questions of governmental privilege were also under consideration. The Central Intelligence Agency and the National Security Agency had documents and information about activities pertaining to plaintiffs. Both of these agencies claimed the secrets of state privilege with respect to documents and information relating to this case.

Thus, the Court had before it simultaneously the informant privilege claim of the FBI and the secrets of state privilege claims of the CIA and NSA.

Aside from the ultimate questions of privilege, there were in each case the procedural questions of how to handle the materials presented to the Court which related to the determination of the motions. In connection with the CIA and NSA matters, the Court considered the materials so sensitive that the documents in question, and the crucial affidavits (particularly from the CIA), were never shown to plaintiffs, or even their counsel, in the course of determining the motions. The Court ruled in favor of the CIA and NSA in an opinion dated June 10, 1977. A sealed opinion of that date was also filed containing a full description of the relevant circumstances. This was not shown to plaintiffs' counsel.

In connection with the FBI matter, the Court ruled that a different approach was in order. The considerations are set forth in the bench opinion of May 31, 1977, as supplemented by the minutes of June 22, 1977. The relevant portions of these minutes are Appendices A and B to the present opinion.

It should be noted that the 1331 informants used by the FBI against the SWP and YSA during the period 1960-

1976 included about 300 member informants and about 1000 non-member informants. According to an affidavit submitted by plaintiffs, there was a total of 73 branches of the SWP and YSA in 1976. The FBI has represented that it had 60 member informants in place in the SWP and YSA in 1976; 85 in 1975; 99 in 1974; 105 in 1973; 116 in 1972; and 109 in 1971. The FBI has given the figures going back to 1960. Somewhat fewer informants had been used in years prior to an apparent step-up of the program in about 1971.

From analysis of the available information, it was clear that the seven informant files voluntarily produced in the summer of 1976 were completely inadequate to provide plaintiffs' counsel with any kind of fair selection of the informant files as a whole. Three of them were totally insignificant because of the brief time periods involved or the marginal relationship of the informant to the SWP or YSA. Only two of the files related to informants who had worked into officer roles. These seven files did not begin to provide a representative coverage of the SWP and YSA chapters in important cities. To be sure, two or three of these files are significant. However, this is a minuscule number in comparison with the total of 300 member informants and the grand total of 1300 informants of all kinds. Moreover, it is important to note that the seven files were substantially expurgated.

In the Court's ruling of May 31, 1977, dealing with the question of the eighteen files, the Court stated that the evidence contained in the FBI informant files undoubtedly constitutes the most important body of evidence in this case, recording in immense detail the activities of the informants, the instructions by the FBI to the informants, and the FBI's evaluations of informant activity. The Court

stated that the extensive infiltration of the SWP and YSA by the member informants raises serious questions under the federal Constitution and under various other theories of federal and state law. The Court further noted that the documents in the files indicate that the FBI may have used informants in certain instances to destroy or weaken chapters of the SWP and YSA, to remove private documents for production to the FBI, and to perform other types of activities whose legality was highly questionable. The Court stated in essence that a procedure needed to be arrived at which would permit plaintiffs' counsel to obtain access to some reasonable selection of the files, and also to permit the parties and the Court to arrive at a method of handling the great bulk of the informant file material by summarization or otherwise, with a minimum of disclosure of informant identities. The Court stated:

"I conclude that there is no legitimate reason for the wholesale public disclosure, in the manner of normal discovery, with respect to all the FBI informant files or the identities of all the informants. I am convinced that, with careful analysis and preparation, much of the necessary information about the informant activities can be presented at the trial of this action without identifying specific informants. I discussed this to some extent at the hearing of April 14. However, this preparation and analysis cannot possibly be done without the participation of plaintiffs' attorneys. Neither the Government nor the Court should be relied upon to develop plaintiffs' case.

"It may well be that the files of certain selected informants, and the identities of these informants, should be publicly disclosed in normal discovery proceedings, and that the evidence about these specific informants

should be presented at the trial. There are a variety of reasons why this may be necessary and appropriate. However, the question of whether, and to what extent, this should be done, cannot be decided intelligently without the participation of plaintiffs' attorneys.

"Plaintiffs' counsel must have access to the detailed facts about the use of informants. They have to date been denied access to any such detailed information, except with respect to the seven files produced last summer relating to people whose identity in some way had already been disclosed to them. But these seven files are simply inadequate by a very long way, from providing plaintiffs' counsel with proper information about the activities of the 300 member informants as a whole, to say nothing of the other 1000 or so informants who were not members."

The solution reached by the Court was to order at that time production of the eighteen files to specified attorneys representing plaintiffs, with direction that they should not reveal the identities of the informants or any information in the files to anyone else without specific authorization of the Court.

The Court also stated that the production would undoubtedly go beyond the eighteen files, as there was reason to believe that valuable and important information was contained "in various other" of the informant files. However, the Court reiterated in essence that the handling of the information contained in the other files, whether by summarization or by production of some of these files, would await the analysis of the eighteen files by plaintiffs counsel.[7]

[7] Judge Van Graafeiland's opinion, in the Court of Appeals, interpreted the May 31, 1977 ruling as suggesting that production "might encompass the full thirteen hundred informant files," and indicated concern that the course on which the District Court had embarked would lead to disclosure for which there is no substantial need. Judge Van Graafeiland warned against "a wholesale disclosure of informants' identities." 565 F.2d at 23-24.

As indicated above, the Court's reference to files beyond the eighteen was only to "various other" files among 1300. In any event, the concern and the warning of the Court of Appeals with regard to excessive production of files will be seriously heeded.

In order to keep publicity to an absolute minimum, the Court directed the attorneys not to reveal even the fact that this order had been entered and this procedure was taking place. The opinion of May 31, 1977 was sealed. It was unsealed only at the direction of the Court of Appeals in the course of proceedings there.

The Court wishes to state that, in five years of experience with plaintiffs' attorneys in this case, these attorneys have demonstrated beyond any question their total reliability. They have proved that, while they may strongly object to certain directions of the Court, they will obey those directions to the letter, including orders of confidentiality.

The Government sought review of the May 31, 1977 order by both appeal and mandamus petition. Implementation of the order was stayed pending the outcome of the appellate proceedings. On October 11, 1977 the Court of Appeals dismissed the appeal and denied the mandamus petition. *In re United States,* 565 F.2d 19. Judge Van Graafeiland wrote an opinion, joined by Judge Webster of the Eighth Circuit, sitting by designation. District Judge Doolin, also sitting by designation, concurred in the result.

The majority opinion expressly ruled on the controlling questions of law—that the informant files are subject to the informant privilege, that this privilege is applicable

in civil as well as criminal cases, and that it is a qualified privilege, which is overcome if a party to a litigation carries the burden of showing that the need for disclosure outweighs the claim of privilege. The opinion went on to apply the further rule of law that it is within the discretion of the district judge to permit opposing counsel to participate in and assist in the conduct of *in camera* proceedings under a pledge of secrecy. 565 F.2d at 22-23. Finally, the opinion held that the procedure directed by the District Court in the present case was within its discretion. 565 F.2d at 23.

The Government applied for a rehearing, with the suggestion of rehearing *en banc*. This petition was denied on March 9, 1978, no active judge, or judge who was a member of the panel, voting for rehearing. Judge Webster, by then the new Director of the Federal Bureau of Investigation, did not participate in the action on the rehearing petition.

While the petition for rehearing was pending, this Court, as it had done several times previously, conferred with the attorneys to determine whether there would be any way to break the "log jam" on the informant discovery issue so that the case could move to trial. This Court noted that the main feature of the Government's argument in the rehearing petition (and at least a major feature in the earlier mandamus petition) was the argument that the District Court had abused its discretion by failing to make a file-by-file analysis of the informant files and a determination in each case as to whether the need for the file in discovery and evidence outweighed the interest in informant confidentiality. The Court further noted that the Government in its arguments to the Court of Appeals had treated as of little or no value the secrecy imposed upon

plaintiffs' counsel in the May 31, 1977 order. Accordingly, after discussion with the attorneys, the District Court made a proposal designed to respond to these arguments made by the Government to the Court of Appeals. The thought was that, although there were important advantages in the view of the District Court to the method employed in the May 31, 1977 order, nevertheless alternative procedures could be considered. The hope was that, in view of the already lengthy appellate proceedings over what was, after all, a preliminary discovery matter, there could be a compromise which would put an end to the motion in the Court of Appeals, and prevent further delay from a possible Government petition to the Supreme Court.

In January 1978 the Court proposed that it would make a file-by-file review in accordance with the argument of the Government in the Court of Appeals as to the correct procedure to be used. Under this proposal the files selected by the Court would be, in accordance with the Government's theory, produced with normal public disclosure, since the Government allegedly had no interest in restricting access to plaintiffs' counsel. The Court undertook this procedure, and on January 27, 1978 stated to the attorneys that it would propose the production of nine of the eighteen files through public discovery. The Court proposed that, if this proposal was acceptable to the parties, and if there could be an end to appellate proceedings so that the case could move forward, the Court would withdraw the May 31, 1977 order and substitute the new procedure.

At the time of the January 27, 1978 proposal, it was expected that the Government would respond and advise the Court if the Government considered that the production of any of the nine files would involve an abuse of discretion, applying legally relevant considerations.

On February 10, 1978 the Government announced that it would object to the production of *all nine* files, but that it was attempting to obtain consents of at least some of the informants so that the files of such consenting persons could be produced.

The Government's objections, covering all nine files, were frivolous, and did not represent a fair response to the Court's proposal. Moreover, the idea that production of informant files should depend on the informants' consent had no basis in the law and had never been mentioned before in all the lengthy proceedings about the informant files in the District Court and the Court of Appeals. This was pointed out to the Government.

The final response of the Government was given February 22, 1978. It had obtained the consents of four of the informants, so that the Government would consent to production of four of the nine files, subject to certain conditions. The Government maintained its objections to the other five files.

The net result was to show that the Government was not really interested in the application of the procedure which it had so strenuously urged upon the Court of Appeals, and which had been applied by the District Court in an attempt to settle the matter. The further result was the injection of an entirely new barrier into the picture—the informants' consent. The whittling down of a compromise figure of nine files to four files was both unfair and unacceptable.

Since no settlement of the informant file matter had been reached, the order of May 31, 1977 remained in effect, subject to further proceedings regarding appellate review.

As already noted, the Court of Appeals denied the petition for rehearing on March 9, 1978. The Supreme Court denied certiorari on June 12, 1978.

The Attorney General, as the official ultimately responsible for any decision not to turn over the FBI documents, filed his affidavit on June 13, 1978, refusing to comply with the order of May 31, 1977.

III

It is necessary to deal now in more detail with the contention of the Government that sanctions short of contempt should be imposed under Fed.R.Civ.P. 37.

Rule 37(b)(2) provides in relevant part:

> *"Sanctions by Court in Which Action is Pending.* If . . . a party fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> "(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> "(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> "(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or part thereof, or rendering a judgment by default against the disobedient party;
>
> "(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of

court the failure to obey any orders except an order to submit to a physical or mental examination; . . . ."

The Government suggests the following alternative proposed "sanctions":

(1) Plaintiffs would be allowed to "establish from facts within their knowledge" the amount of damages sustained at each SWP and YSA chapter, and would be given the benefit of a presumption that such damages were *prima facie* the result of informant activity. The Government would have the opportunity, and the burden, of proving that there were no such damages, or that any such damages were not caused by informants.

(2) Plaintiffs can go forward with "full discovery" based on the "twelve informant files now available to plaintiffs". Then plaintiffs can present to the Court a kind of "test" case of injury and damages, so that "the Court can determine at that point the extent to which, if at all, information in these files proved to be necessary to determine the amount of actual damages at any chapter".

(3) If neither of the above is an appropriate sanction, some other issue-related sanction should be devised by the Court and counsel.

The two concrete proposals would not be sanctions within any of the specific provisions of Rule 37. They would not be orders that any facts "shall be taken as established", under (2)(A). They would not be orders refusing to allow defendants to defend designated claims, or prohibiting defendants from introducing evidence favorable to them,

under (2)(B). They would not be orders striking pleadings, or staying further proceedings until the order is obeyed, or rendering a default judgment against the disobedient party, under (2)(C). Indeed, Rule 55(e) would prevent the entry of a default judgment against the Government here.

Of course, the Court has latitude to go beyond the specified items in Rule 37 and fashion other sanctions which would be appropriate. But the vice of the Government's proposals is that, in the context of the history of this case, they are not sanctions in any sense. Not a single issue going to the merits of the case or the Government's jurisdictional defenses is eliminated. No facts are conclusively established. In other words, the proposed sanctions are only further attempts to defeat plaintiffs' motion and to force plaintiffs into trying their case without the crucial informant evidence, or with only the portion of the evidence which the Government has unilaterally decided it will produce.

The Government's proposals, and indeed any issue-oriented Rule 37 sanction, would require the Court to create some mechanism to try the case without plaintiffs' ever obtaining the evidence which the Court has already determined to be an essential *threshold requirement* to any progress in the fair litigation of the issues.

The appropriateness of the Court's exercise of discretion in ordering production of the eighteen informant files to plaintiffs' counsel has already been sustained. However, the Government's proposals for issue-oriented sanctions in place of enforcement of the order for the production of the files, make it necessary yet again to emphasize the essential nature of these files to the litigation of this case.

This Court has studied the eighteen informant files themselves to a substantial extent, and has exhaustively re-

viewed detailed summaries of these files prepared by the Government. This Court has studied the seven informant files voluntarily produced in the summer of 1976 and the two other quite insignificant informant files voluntarily produced at subsequent times. The Court has analyzed these materials as they relate to certain other documents produced by the FBI—particularly the COINTELPRO and Disruption Program documents, and, of course, as they relate to the various legal and factual issues in this case. After careful consideration, it was and is the firm conclusion of the Court that the eighteen FBI informant files contain evidence which is indispensable to plaintiffs' counsel in order for them to proceed with this action on any fair basis. It was and is the Court's further conclusion that this evidence is so basic and essential that no major issue in the case—whether relating to injunctive relief, claims for damages, or jurisdictional defenses—can be resolved without developing a factual record with evidence from these files.

The Court hastens to state that there is no magic in any set number of files—eighteen versus nineteen or seventeen, etc. Moreover, it may be that there are certain other files among the 1300 which contain essential information, or which might in some way be more significant than the eighteen. But plaintiffs have requested what appears to be a remarkably good selection of informant files, considering their modest number, and these files *do indeed* contain evidence of vital importance to plaintiffs. Moreover, it is impossible for the Government, or the Court, to appreciate fully the significance of this evidence from plaintiffs' point of view. Plaintiffs' counsel must have the opportunity to analyze it for themselves.

At one point, in a discussion with counsel after the Court of Appeals ruling, this Court voiced the view, in

"thinking out loud", that if the damage issue were somehow out of the case, the FBI discovery of the informant files would not be necessary (Minutes October 21, 1977, p. 26). Of course, this was a purely hypothetical statement, because the damage claims were not, and are not, out of the case. However, lest there be any misunderstanding about the Court's position, the Court wishes to make it clear that, upon thorough consideration, it views the informant files as relevant to both the damage *and* injunction questions in the case. This becomes more apparent as the case progresses.

As to the injunction issue, there is a very live controversy, despite the termination of the investigation of the SWP and YSA in September 1976. The Government has suggested on occasion that the claim might be moot, but this subject has not been followed up seriously; and plaintiffs clearly do not concede mootness. The announcement of the termination of the investigation came three years after the litigation had been in progress. The injunction claim is not rendered moot unless it is demonstrated that there is no reasonable expectation that the wrong will be repeated. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632-33, 73 S.Ct. 894, 97 L.Ed. 1303 (1952).

The Government has made it clear that it would oppose any injunction in general terms against the FBI prohibiting the investigation of the SWP or YSA, and that the only possible injunction which could be entered would need to be directed against specific activities (Memorandum October 21, 1976 pp. 13-15). Under all the circumstances it is clear that a thorough development of the facts regarding methods and activities of FBI informants will need to be developed in connection with plaintiffs' claim for injunctive relief. In this regard, it is important to note that the Government has consistently urged, as justification for

some or all of the FBI activities, that the SWP and YSA are affiliated with a worldwide federation known as the Fourth International; and that there is in the Fourth International a strong faction, called the Internationalist Tendency, which espouses violence. *See Socialist Workers Party* v. *Attorney General*, 510 F.2d 253, 254 (2d Cir. 1974). One essential aspect of the eighteen informant files is that a number of them contain evidence bearing upon the question of whether the Fourth International affiliation led to any criminal or violent actions or plans by SWP and YSA members in the United States.

As to the damage claims, it should be reiterated that plaintiffs are asserting the most serious claim of a plan by the highest officials in the FBI to destroy or cripple the SWP and the YSA and their branches throughout the country.

Plaintiffs allege that as part of, and in addition to this disruption plan, the FBI, through its informants, committed illegal acts by converting private documents, interfering with the privacy of the organizations and their members, and assuming leadership roles and thus manipulating the organizations.

Plaintiffs must be permitted to develop a full factual record about these matters in order for them to litigate fairly their damage claims against the Government, both as to the alleged overall plans to destroy and cripple, and the individual instances of alleged wrongdoing in various locations. The Government's repeated assertions that all these damage claims can be dismissed as a matter of law are totally unrealistic.

The Court notes that on June 21, 1978 the Government filed a motion to dismiss "damage claims in the Second Amended Complaint with respect to informant activity for lack of subject matter jurisdiction". The motion was filed

with knowledge that it would be adjourned, and was immediately adjourned to September 18, 1978. The Government now requests that any decision to hold the Attorney General in contempt be deferred until after decision of the above motion.

The grounds urged in the new motion to dismiss could have been raised as much as two years ago. It provides no justification for delaying the enforcement of the May 31, 1977 discovery order.

It is necessary to return briefly to the "sanctions" proposed by the Government. The first proposal is to have plaintiffs establish their damages from facts in their possession, and that there would be a *prima facie* presumption that such damages were the result of informant activity, subject to the ability of the Government to prove the contrary.

After study of the issues, the Court is convinced that this proposal would leave plaintiffs in an impossible position. Without a representative sample of the detailed evidence in the informant files, and some reasonable summarization of the other informant file evidence, plaintiffs are deprived of the most important source of evidence needed by them both to develop the full nature of the wrongdoings and damages, and to rebut Government defense evidence.[8]

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[8] The problem can be illustrated by reference to the informant Redfearn. Assume, hypothetically, the trial of the YSA's claim about burglaries in Denver. The YSA knew that there had been a burglary at certain premises, and suspected Government involvement. Presumably under the Government's proposal, the YSA would present this claim to the Court. Then the Government could call agents from the FBI in Denver to deny any burglary. It is interesting to suppose that such testimony were to be given by the agent who signed the answers to interrogatories, and who in effect denied burglaries by Redfearn in those answers. Presumably he would make such denials at the trial. We now know that

The second proposal for sanctions by the Government asks that plaintiffs go forward with some kind of test case based on eight files voluntarily produced previously, and the four files from the eighteen which the Government is willing to produce now. This is simply a renewed effort to whittle down plaintiffs' already modest, compromise request for documents. The files which the Government is willing to produce do not constitute a fair selection. They do not cover the range of locations and activities embraced in the total number of files ordered to be produced by the Court.

The third proposal is to have further discussion about possible sanctions. In the Court's considered opinion, on the basis of long experience with this problem, the suggestion of further discussions would only result in further delay.

The present case is strikingly similar to *United States* v. *International Business Machines Corp.*, 60 F.R.D. 658 (S.D.N.Y.), *appeal dismissed*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974), where the District Court held IBM in civil contempt and imposed a fine of $150,000 per day for failure to produce allegedly privileged documents. This contempt citation was made at the urging of the Department of Justice to the effect that issue-related sanctions would be ineffective and that full enforcement of the Court's order through a contempt citation was the only appropriate remedy.

The Government has cited a number of decisions in which issue-oriented sanctions were imposed to remedy discovery defaults by the Government. Without exception,

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this agent falsified the answers to interrogatories and the Redfearn file showed burglaries. But if plaintiffs did *not* have the file, they would have no way of rebutting the Government agent.

these were cases in which the full nature of the wrongs allegedly inflicted on the plaintiffs, and of the damages allegedly resulting, were already known to the plaintiffs. The evidence which the Government declined to produce in those cases was evidence going to the issue of the Government's responsibility for the harms suffered by the plaintiffs—for example, the negligence or wrongful motive of an agent of the Government. When the Government withheld the evidence on this issue, it was possible for the courts to impose as a sanction the resolution against the Government of this discrete, well-defined question of Government responsibility. These precedents are therefore of no help to the Court in resolving the present problem. In all of these cases, there was a *workable alternative* to the contempt sanction.[9]

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[9] *See United States* v. *Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953) (plaintiffs were widows of men killed in airplane crash; Government refused to obey order to produce accident reports; district court ordered facts as to negligence established in plaintiffs' favor); *Black* v. *Sheraton Corp.*, 184 U.S. App. D.C. 46, 564 F.2d 531 (1977) (action for damages from illegal FBI eavesdropping on theories of trespass, invasion of privacy, and violation of constitutional rights; Government refused to produce documents from FBI file; as sanction, district court held that plaintiff had made a prima facie showing that the Government's conduct was a substantial cause of well defined damages asserted by plaintiff); *Smith* v. *Schlesinger*, 168 U.S.App.D.C. 204, 513 F.2d 462 (1975) (plaintiff, a former aerospace engineer, sued claiming that revocation of his security clearance was arbitrary and capricious; Government refused to comply with court order to produce plaintiff's investigative file; district court ordered Government precluded from introducing evidence on the reason for denial of the clearance); *Campbell* v. *Eastland*, 307 F.2d 478, 492 (5th Cir. 1962), *cert. denied*, 371 U.S. 955, 83 S.Ct. 502, 9 L.Ed.2d 502 (1963) (action for tax refund; Government refused to produce materials from criminal tax investigation file; district court ordered answer struck and judgment entered in amount of refund claimed; circuit court reversed, holding that a more limited sanction would be more just *and would be workable:* "the plaintiffs did not show that they were dependent on information from

Appendix D—Opinion of District Court—June 30, 1978

In the present action, there is, in the considered opinion of the Court, no workable alternative to full enforcement of the Court's order through contempt.

Conclusion

For the foregoing reasons, plaintiffs' motion to cite the Attorney General of the United States for civil contempt of court for failure to comply with the order of the Court dated May 31, 1977 is granted to the extent that the Attorney General is given notice that he must comply with the order forthwith, and that if he does not comply by 5:00 p. m. July 7, 1978, he will automatically be in civil contempt of court thereafter until he complies with the order. To the extent that plaintiffs apply for an order directing the imprisonment of the Attorney General, that application is denied, without prejudice to the making of a renewed motion for that or other specific sanctions.

So ordered.

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the Government to prove their loss; they sought discovery for the purpose of anticipating collateral objections that the Government might raise"); *Bank Line* v. *United States*, 163 F.2d 133 (2d Cir. 1947) (action for damages arising out of maritime collision; Government refused to produce investigative reports and persisted in refusal after it was unable to obtain interlocutory review; district court precluded Government from introducing evidence as to side of channel on which collision occurred); *Kahn* v. *Secretary*, 53 F.R.D. 241 (D.Mass. 1971) (plaintiff alleged his application for a reserve officer's commission was denied for improper reasons; Government defendants refused discovery; district court ordered it established that plaintiff was denied a position on unsubstantiated grounds of security); *O'Neill* v. *United States*, 79 F.Supp. 827 (E.D.Pa. 1948), *rev'd sub nom. Alltmont* v. *United States*, 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967, 70 S.Ct. 999, 94 L.Ed. 1375 (1950) (admiralty action for personal injuries incurred when ship was sunk by enemy mine; Government refused to produce FBI investigative reports; district court ordered Government precluded from contesting allegations of negligence and unseaworthiness).

Appendix D-Opinion of District Court 6/30/78

APPENDIX A
[to the district court's opinion]

Excerpt from Minutes of May 31, 1977

THE COURT:

The bulk of what I wish to discuss today deals with the FBI informant issue.

I have decided to direct that the FBI make available to specific attorneys for plaintiffs the files and summaries thereof of the eighteen numbered informants about which we have had discussions. Except by specific court permission, plaintiff's counsel will confine this information strictly to themselves without revelation to their clients or to anyone else beyond the specified lawyers.

But let me summarize briefly my reasons for directing this procedure. These reasons have already been discussed to a large extent at the in camera hearing of May 19.

I start with the proposition which has been articulated many times, which is virtually conceded, that the principal activity of the FBI vis-a-vis the Socialist Workers Party and the Young Socialist Alliance was the use of informants. During the period beginning about 1960, up to the discontinuance of the program by the FBI in the fall of 1976, it appears that during this period of time, some 1300 informants were used by the FBI in its investigation of the SWP

and YSA. That includes 300 persons who were apparently members of the SWP or the YSA.

The other approximately 1000 would apparently be people such as janitors or employees of banks or employees of schools or other people who were in a position to give information to the FBI, but they did not apparently literally infiltrate the membership of the SWP or the YSA.

It has been recognized for a long time in this case that the informant issue lies at the very heart of the plaintiffs' case as to the FBI. I would venture to say that although there are other Government agencies and officials sued in the case, the cause of action against the FBI is by far the most important phase of the plaintiffs' claims in this entire action.

From the very outset everyone has recognized that the disclosure of the evidence about the informant activity presents a most difficult problem. This has led the plaintiffs to approach the matter in a rather gingerly step-by-step process.

It has led the FBI to strongly object to the production of any information which would lead to the identification of informants who were not otherwise already identified. It has led to extremely cumbersome discovery procedures which have involved the FBI and the Department of Justice in great labor and which have consumed vastly greater amounts of time than

would ever be conceived of in the discovery in an ordinary case.

Three basic things have been carried out in connection with discovery on the FBI informant issue. Some time ago the plaintiffs addressed interrogatories to the Government asking for certain specific items of information about the informants. There are some 1300 sets of interrogatory answers supplied, which were gotten together by local offices of the FBI and reviewed to some extent by the Washington office of the FBI and the Department of Justice.

It is safe to say that for a variety of reasons these answers to interrogatories, although undoubtedly requiring great effort of preparation, are totally inadequate to provide the kind of evidence that any competent plaintiff's attorney would wish to have for the pursuit of this case.

The second stage occurred last summer when plaintiffs asked for the production of FBI files relating to seven informants whose identities plaintiffs had learned. After some initial opposition, the Government consented or did not oppose the production of these files, for the reason that the identities of these persons were already known to the plaintiffs, and therefore, the confidentiality simply did not exist. These files were produced to the plaintiffs last summer.

The next stage occurred with the application by the plaintiffs for the production of nineteen additional files relating to

informants listed by number in the answers to interrogatories, but whose identities have not been disclosed. The plaintiffs made a selection of these 19 from the total of about 1300, believing that they would provide a sample somewhat broader and somewhat more representative than the seven informants whose files they obtained last summer. The application for the production of these nineteen additional files was made last August. It was opposed by the Government. An official of the FBI submitted an affidavit explaining the claim of privilege. This affidavit was dated October 4, 1976. This official testified in early November 1976.

The trouble with the presentation at that time was that it all dealt with the general proposition that the disclosure of informants would subject such people to retaliation by the SWP and the YSA and would create a severe psychological problem in the relationship between the FBI and informants in other investigation programs. But no one had reviewed the files in question. Consequently I felt that we were engaged in a somewhat theoretical exercise which did not permit any sensible ruling pro or con on the claim of privilege.

This led me to at first request an opportunity for an in camera review of the nineteen files. This provided me with some information, but the nineteen files were sufficiently voluminous that I realized it would be impossible for me personally or

for my law clerk personally or both of us personally to really make any kind of intelligent review of the files.

Consequently, in late November 1976 I asked the FBI and the Department of Justice to provide summaries of the nineteen files answering certain listed questions. This process took far longer than I envisioned, and undoubtedly took a great deal of work, but the summaries were finished in early April.

As I understand it, the Government's objection to one of these nineteen files has been withdrawn, leaving eighteen in contest. The summaries of these files were gotten together in a most painstaking manner and, as far as I could tell, were done with scrupulous accuracy and completeness. I certainly have not checked them out in any complete sense, but on a small spotcheck basis they certainly appear complete and on their face they represent clearly a tremendous effort at completeness and accuracy.

At a hearing of April 14, 1977, I summarized the type of information which was contained in the files. I did this on the public record without disclosing any particulars which would lead to the identification of the specific informants. As the record shows, I did not attempt to make any ruling pro or con on the claim of privilege as to the informant files, these eighteen files in question.

I went ahead at that time and raised with the parties the basic and very important problem as to the handling of the overall informant evidence question in this case. The problem in this case regarding discovery and evidence is not answered by eighteen files or any small number of files. The evidence and discovery problem in this case can only be resolved when we come to grips with the handling of the information about FBI informants on a comprehensive basis. Ultimately, that involves handling some 1300 informant files in a reasonable way.

On April 14, I made some proposals about having the Government make further extracts from the informant files which might provide evidence for the case with a minimum of identification of specific informants.

This was discussed without ruling finally on the question of the eighteen files in contest.

At the hearing of May 5, Mr. Boudin on behalf of the plaintiffs argued that, for a variety of reasons, no amount of Government summarization of the raw data would suffice. He also made application for the disclosure of the identities of all 1300 informants and indicated that in his view the files themselves would be an impractical means of handling discovery on all 1300 informants because of the immense volume of the files and the need to conduct independent inquiries, and take depositions.

At either the April 14 or the May 5

hearing I broached the suggestion that perhaps a way to get through our many impasses on this informant issue was to have plaintiffs' counsel be able to review informant files on restricted basis without any disclosure to plaintiffs or to the public. This led to our meeting in camera on May 19. Mr. Boudin at first took the position that he would not agree to review files without being able to discuss the information with a representative of his clients.

Since the May 19 meeting I have had letters from Mr. Boudin dated May 23 and from Mr. Brandt dated May 24 announcing their final positions as to the idea of the restricted review of the FBI informant files by plaintiffs' counsel.

The Government strongly objects to production of any informant files or summaries to plaintiffs' attorneys. Mr. Boudin on behalf of the plaintiffs still takes exception to a restriction which prevents his sharing discovery information with his clients. However, Mr. Boudin's final position is that if the Court orders that the inspection of the FBI informant files be limited to plaintiffs' counsel only, without any revelation of the contents to his clients or representative thereof, he would go forward with such an inspection, and gives full assurance that the restrictions imposed by the court would be completely honored.

I propose to proceed on that basis, that is, directing the production of the eighteen files in question and the summaries thereof

to plaintiffs' counsel for their use and their use only, subject to any further order of the Court that might be appropriate at a later time.

My basic reasons for doing this are the following: In the first place, there is a sharp distinction between production of these materials to plaintiffs' counsel on a restricted basis, and the public disclosure of the materials by way of ordinary discovery. This distinction is highly relevant to the objections of the FBI to production of the informant files. The two basic objections are that such disclosure will lead to the public identification of the informants and a danger of retaliation against them by the plaintiff organization; and that public disclosure of the files, and the identification of the informants, will tend to cause informants in other Government investigations to fear loss of confidentiality, thus jeopardizing these other informant programs.

As to the risk of retaliation against the informants, there is no contention, of course, that plaintiffs' attorneys will engage in such retaliation, I do not mean to imply that plaintiffs themselves would do so. But it is clear that production to plaintiffs' lawyers, in and of itself, simply will not occasion any difficulty regarding retaliation.

With respect to the danger to other Government informant programs, the problem boils down to the theory that if other

informants or potential informants learn that the SWP and YSA informants have been identified and subjected to publicity, possible harassment, etc., then the informants and potential informants in the other programs might fear the same would happen to them. However, as already stated, a restricted production of informant files to plaintiffs' counsel simply does not involve the public identification and exposure of the SWP and YSA informants. There can be no headlines in the press about revelation of names of informants or anything of this kind. Even the fact of the procedure being used -- that is, production to plaintiffs' attorneys -- I intend to have treated with the maximum of confidentiality.

Thus it is my view that the restricted production of informant files to plaintiffs' counsel involves no interference -- or a negligible interference -- with legitimate law enforcement and other interests sought to be protected by the FBI and other Governmental agencies.

The Government contends that there is no sufficient showing of the need for production of the informant files, even on a restricted basis, to plaintiffs' attorneys. I reject this contention.

The files of the FBI regarding the 1300 informants used against the SWP and YSA undoubtedly constitute the most important body of evidence in this case. They record in immense detail the activities of the

informants, the instructions of the FBI, evaluations by the FBI, and so forth.

The extensive infiltration of the SWP and YSA by the FBI's member-informants, and the gathering of information from various kinds of non-member informants, raise serious questions under the federal constitution, as well as other federal and state laws and legal doctrines. There is a serious question as to whether the bulk of these FBI activities had any valid law enforcement purpose. Indeed, in the fall of 1976 the Attorney General ordered the FBI investigation of the SWP and YSA to cease.

The Government contends that discovery of the informant files is unnecessary because the voluntary cessation of the informant program precludes the need for injunctive relief, and because there are various legal barriers to any recovery of damages, particularly under the Federal Tort Claims Act. On the latter point, I have previously denied a motion to dismiss the claims under the Federal Tort Claims Act, on the ground that the legal issues could not be properly determined without the development of a factual record. I adhere to that ruling. There are indications from the few files thus far examined that there may be a variety of tortious acts which were committed by the FBI, including trespass and conversion of property. The latter refers to removal of private documents for production to the FBI. The FBI and certain informants

may have engaged in activities designed to intentionally destroy certain chapters of the SWP and YSA. The evidence about the FBI informants may reveal other activities giving rise to valid claims for damages.

I am not attempting to indicate any view on the ultimate merits of any claim. I am only stating that there are questions which are sufficiently serious to merit thorough exploration of the evidence.

I have reached certain conclusions about the discovery procedure to be used. To a great extent these conclusions are based upon my analysis of the summaries of the 19 informants' files now requested by plaintiffs, plus information about the 7 files voluntarily produced last summer. I conclude that there is no legitimate reason for the wholesale public disclosure, in the manner of normal discovery, with respect to all the FBI informant files or the identities of all the informants. I am convinced that, with careful analysis and preparation, much of the necessary information about the informant activities can be presented at the trial of this action without identifying specific informants. I discussed this to some extent at the hearing of April 14. However, this preparation and analysis cannot possibly be done without the participation of plaintiffs' attorneys. Neither the Government nor the Court should be relied upon to develop plaintiffs' case.

It may well be that the files of certain selected informants, and the identities of these informants, should be publicly disclosed in normal discovery proceedings, and that the evidence about these specific informants should be presented at the trial. There are a variety of reasons why this may be necessary and appropriate. However, the question of whether, and to what extent, this should be done, cannot be decided intelligently without the participation of plaintiffs' attorneys.

Plaintiffs' counsel must have access to the detailed facts about the use of informants. They have to date been denied access to any such detailed information, except with respect to the seven files produced last summer relating to people whose identity in some way had already been disclosed to them. But these seven files are simply inadequate by a very long way, from providing plaintiffs' counsel with proper information about the activities of the 300 member informants as a whole, to say nothing of the other 1000 or so informants who were not members.

The procedure of summarizing, having the FBI or the Department of Justice summarize files, constitutes a deprivation of the plaintiffs' lawyers from anything resembling their normal right to develop their own evidence.

If we go along on some basis where we are relying on summarization by the FBI

and the Department of Justice, we are multiplying the burden on the Government enormously and multiplying the time required for any development of the issues by a tremendous degree. In other words, a new process simply has to be instituted. Both the burden and the opportunity of viewing the basic evidence should be and must be in the hands of plaintiffs' lawyers. That is the only way the litigation can proceed from here on out in any sensible fashion.

Let me outline the procedure I have in mind specifically. I want to say at this point that I am starting with the eighteen files, but I want it clearly understood that I envision that the production will not stop with the eighteen files and undoubtedly will go beyond these files. The information contained in the eighteen files is sufficiently valuable and of sufficient importance to indicate that there is valuable and important information, or there should be valuable and important information in various other of the remaining 300-odd files of member informants, and indeed another thousand files for nonmember informants. I intend at the present time to start with the eighteen, and I think this will permit an intelligent discussion by all concerned as to the issue of whether any of those specific files should be revealed in public discovery, whether there should be depositions taken by the informants, and how to handle in some intelligent, sensible way the information contained in the large number of other files.

I come now to the question of the precise persons who will have access to the files. I have no question about Mr. Boudin and Mr. Jordan, and I am well acquainted with them through the history of this case, and I state flatly that I have no doubt whatever that they will faithfully obey the orders of this Court with respect to confidentiality.

Mr. Boudin has written me in his letter of May 23 expressing his difficulty in having the production limited to two lawyers only, and he has mentioned his need for having the other two lawyers on the case work also. I assume that you are referring to Ms. Pike and Ms. Winter?

MR. BOUDIN: Precisely.

THE COURT: He has stated that Ms. Winter, however, is a member of the Socialist Workers Party. I will come to that in just a minute.

Ms. Pike, I take it you are not a member of any of the plaintiff organization?

MS. PIKE: That is correct.

MR. BOUDIN: May I just interrupt. We are, four of us, members of the bar. Your Honor does know me and Mr. Jordan. Your Honor has had both other counsel before you on a number of sessions. They are both members of the bar of the District of Columbia, and they have been admitted for purposes of this case, and I vouch for their reliability. I cannot have a distinction made among counsel

who are associated with me in a case and have the Court place a certain value of reliability upon one counsel as against the other. I am the principal counsel, and I am responsible for this case, and I really think that I may have been unwise in indicating a reference to membership by one of my co-counsel in the Socialist Workers Party. So far as we are here, we are here only as lawyers.

THE COURT: I have no problems as far as Ms. Pike. I think that I have observed Ms. Winter, she has appeared before me, and also in fact I think I know her a little better than Ms. Pike. From what I can see, I have the greatest respect. I don't think this is really a matter of personal respect anyway. I don't think that is anything that should enter into it, except if there was a lawyer who I did not have confidence in, I would not engage in this activity.

I must tell you that our problem here is largely with respect to possible publicity, and I am concerned with several things on the question of publicity and just let me mention them.

As to the FBI's fear for other informant programs, we are dealing, as I said before, in a somewhat speculative area. We are dealing with the subject of risk. What risk is run over what length of time by publicity about disclosure of informants? What amount of accuracy or inaccuracy or exaggeration can occur in the press? We all know that that is inherent with the best

will in the world. There are things that get exaggerated or misunderstood, etc. Then for the people who will read this publicity, if it ever occurs, and who might be in the position of the informant or potential informant that the FBI is talking about, the effect of publicity on them, again it is speculative but the risk, it seems to me, is there, and I want to be concerned about it, that you might have people who are sufficiently frightened for one reason or another that the scales are tipped by publicity. That is what I am concerned about.

Now, as to the possibility of leakage resulting from the procedure I contemplate, I really am not concerned about the actual disclosure of informants identities. I just think that whether it is Ms. Winter or any of you or any other group of attorneys, if the order is that you are not to disclose information or names to the press, that just won't be done period.

MR. BOUDIN: Right.

THE COURT: Let us come to another consideration. With respect to this procedure, the fact that the materials are being disclosed to you as counsel, it is desirable that we go about this procedure in the greatest confidence obtainable. I am going to enter as much of an order as I can to insure that. But I am not under any illusion that there is no chance that the fact of the procedure may become known to the press or be inferred by the press.

And, I am willing to run that risk, frankly, and I think it is very little risk compared with the value of this case of getting the job done. Certainly, under the Roviaro case I think the Court has discretion to run some minimal risk. It is much less of a problem if the press picks up the fact that counsel were given the identities on a confidential basis than if the press could print names of informants.

But I want to consider whether there is some problem if you have a member of the SWP as an attorney.

MR. BOUDIN: Let me address myself to that, because that is where your Honor is wrong. I thought about it, obviously. I thought about it before I wrote my letter. What your Honor is going to do here is to direct in camera that counsel -- just called counsel -- can have access to these records. We are not going to publicize or give notice to anyone even that counsel has been given this, nor I assume will the Government give notice even that counsel --

THE COURT; You understand that, Mr. Stapleton?

MR. STAPLETON: Yes.

MR. BOUDIN: The question of which counsel associated with me can look at documents is a question completely within my office. It is not a matter of publicity. We don't

announce who is going to look at it. It is simply that I as counsel for the plaintiffs will decide which of the lawyers in my office -- it happens to be one of these four - will be doing the work on the matter.

You mentioned a dual aspect. There is nothing dual about this, your Honor. Everybody has his own political affiliations, or almost everybody has, of one kind or another. And I don't regard that as creating a dual loyalty. In this case, no matter what I may be elsewhere, I am only counsel for the plaintiffs and a member of the bar. My own political views and associations are completely irrelevant, and there is no dual responsibility.

THE COURT: In other words, you would vouch for Ms. Winter that insofar as the requirements of this case, insofar as obeying the orders of the Court, you would vouch for her that her prime loyalty in what we are talking about is to obey the Court's orders.

MR. BOUDIN: The only loyalty in this case is to Court and the case and to your Honor. There is no loyalty on her part to any organization as she acts as counsel here, any more than there is any loyalty on the part of other attorneys here who may have other associations. And I suspect that I have probably been charged with many more associations, mostly untrue, in the course of my lifetime. When I act as counsel, I

act only as counsel and an officer of the Court. And I vouch that that will occur here.

MR. BRANDT: Your Honor, if I might just add --

THE COURT: Let me finish, I think you understand my problem, Ms. Winter. What I would like to know from you, and I am sure will be utterly frank with me, is there any problem at all, as far as you are concerned, with maintaining 100 percent all directions about confidentiality that I impose here? Is there any problem as far as your are concerned in maintaining that, obeying that, even though you are a member of the Socialist Workers Party?

MS. WINTER: Your Honor, I have no problem with that whatsoever.

MR. BRANDT: Your Honor, may I just voice the Government's objection to the addition of the attorneys, in addition to our objection to the proceeding.

THE COURT: I thought you had voiced your objection in a letter.

MR. BRANDT: I just wanted to make it clear, being that we are discussing this particular matter of additional attorneys being given the identity of the FBI's eighteen informants. I just wanted the objection clearly stated for the record.

THE COURT: I think I understand you have objected entirely to this procedure,

and I will assume that the record will reflect that. I will direct that the materials that I have referred to be made available to Mr. Boudin, Mr. Jordan, Ms. Pike and Ms. Winter. The order specifically covers now the eighteen files in question and the summaries thereof. Further applications may be made for further relief. I don't think we have to cover that now. As far as any files beyond the eighteen, I would want that subject to a further application.

I am specifically directing, and I will enter no further order, that the information contained in these files and in the summaries is to be given to absolutely no one beyond the four lawyers unless specifically permitted by the Court. The importance of this procedure is obviously known to the four lawyers and it is known to Mr. Stapleton, who I think is the chief liaison with the lawyers for the plaintiff organizations. I specifically invited him today to be here, and I specifically authorized Mr. Boudin to keep him fully informed of our proceedings last time. I am directing that neither Mr. Stapleton nor the plaintiffs' lawyers make any statement whatever to the press about the procedure which we are using.

APPENDIX B
[to the district court's opinion]

Excerpt from Minutes of 6/22/77

THE COURT:

One of the things that is displayed in the 19 files which I have reviewed in camera and I have had summarized, one of the things which comes forth there is material dealing with the so-called International Tendency, I think is the word for it. We all recall that at the time of the preliminary injunction motion in late 1974 the government claimed as a justification for infiltrating the upcoming convention that there was reason to suspect violent activity or planning of violent activity on the part of the Socialist Workers Party and to keep surveillance about such matters, for the following reason:

The claim was that the Fourth International had passed a resolution in 1969 at its world congress approving terrorism or violent revolution in Latin America, that the majority of the Fourth International had approved this motion. It was recognized that the United States party, that is, the Socialist Workers Party, had voted against that resolution and argued against it, but the government went on to contend that there were elements even within the Socialist Workers Party which espoused a revolution or favored violence or terrorism in Latin America.

This gets rather complicated because of procedural problems in the Socialist Workers Party and the Fourth International, but the idea was that a minority within the Socialist Workers Party appeared to favor the pro violence resolution of the Fourth International.

If I recall correctly, the Court of Appeals relied on this to a substantial extent, relied on this argument of the government in reversing the injunction which I had entered. It was quite apparent that this was an area which required factual exploration in connection with the trial of this action.

This is not an area which is easy to deal with. It is not an area which is easy to get the relevant facts concerning. But the informant files are an important source of facts about that matter. And I discussed that in a general way at the April hearing when I was summarizing in a general way what was shown in the informant files.

I simply want to expand on that now by saying that certain of the 19 informant files contain reporting about meetings of this minority group within the Socialist Workers Party,which is called the Internationalist Tendency, I believe, that was organized by people who thought they favored the pro violence revolution. These

informant files, therefore, in my view, contain important information on this issue which the Court of Appeals felt was important and which is important; that is, the extent of the influence of the pro violence group in the United States party, if any; what was discussed, what was done, what did the FBI know about the extent of pro violence, were there any plans of violent activity affecting the United States or any other country by this group or any other group in the Socialist Workers Party, or was it simply a discussion of other matters?

I say the latter, because from my review of these files it appears that although there was this thing called the Internationalist Tendency and although there was the resolution by the Fourth International we talk about, I have read the material about the observations of discussion within the Internationalist Tendency; I have yet to read anything in these informant files indicating any planning of actual violence or discussions of actual violence among Socialist Workers groups in the United States.

I'm not saying that to make a finding of fact; there may be other information. All I am trying to indicate is that these without question constitute an important source of information about the extent of any discussions of violence or a lack of discussions of violence by this particular segment of the SWP. It contains an important source of information as to what the FBI

Appendix D-Opinion of District Court 6/30/78

knew about the actual facts about this Internationalist Tendency.

I want to add this as one important reason why these files are an absolutely indispensable source of evidence in this case and at the very least in my continuing view they should be furnished to plaintiffs' counsel for this and other reasons. That terminates our conference.

APPENDIX E

Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SOCIALIST WORKERS PARTY, et al.,
Plaintiffs, :
v. 73 Civ
ATTORNEY GENERAL OF THE UNITED : 3160
STATES, et al., OPINION
Defendants. :

- - - - - - - - - - - - - - - - - - - x

GRIESA, J.

This Court held, in its opinion of June 30, 1978, that the Attorney General of the United States would be required to comply with the order of May 31, 1977 forthwith; that compliance by 5:00 P.M., July 7, 1978 would be deemed sufficient compliance with the order; and that in the event of non-compliance with the order the Attorney General would be in civil contempt of the court. The stated purpose of allowing until July 7 for compliance was to give the Attorney General time to make a final decision as to what his decision would be.

The Attorney General has this day filed an affidavit stating that he will not comply with the order of May 31, 1977 and will not direct the FBI to produce the files pursuant to that order. The United States Attorney for the Southern District of New York has applied, on behalf of the Attorney General,

for a stay of the contempt citation, pending appellate review of the June 30, 1978 decision.

In response to the affidavit of the Attorney General and the application of the United States Attorney, the Court rules as follows:

(1) Because the Attorney General has announced that he will not comply with the order of May 31, 1977, the Attorney General is hereby adjudged to be in civil contempt of court, and will remain in contempt of court until and unless he purges his contempt by compliance with the order.

(2) The application for a stay of the contempt citation pending appellate review is denied.

The background and reasoning underlying the contempt citation are set forth in the opinion of June 30, 1978. However, a short additional statement is in order.

Following the ruling of May 31, 1977,this Court granted a stay of that order to permit the Government to seek appellate review. That stay was in effect for approximately one year while the Government proceeded in both the Court of Appeals and the Supreme Court.

The Attorney General now seeks to commence a new round of appellate review. In the considered judgment of this Court, as more

fully set forth in the opinion of June 30, 1978, there is no legitimate ground for seeking further appellate review, and the attempt to do so constitutes a totally unjustified attempt to obstruct and delay.

This Court is convinced that the Government has obtained a full measure of review on the merits of the May 31, 1977 order. This is not a case where review was denied on some minor procedural or technical ground. The Court of Appeals entertained with full scope the application of the Government for a writ of mandamus, and made a complete set of findings on all applicable questions of law. The Court of Appeals concluded that the May 31, 1977 order was made pursuant to the lawful discretion of the District Court. The Supreme Court denied certiorari, thus leaving the Court of Appeals ruling and the District Court Order in place. There is no indication that the Supreme Court acted on some narrow procedural or technical ground. The Supreme Court obviously did not consider the matter of sufficient significance to take on certiorari, thus denying discretionary review as it does in multitudes of cases.

Since there is no demonstrable ground for further appellate review,this Court cannot in good conscience grant a stay pending appellate review.

In a recent address to a bar association, President Carter strongly warned about

delays in litigation occasioned by litigants who have the power and resources to create obstructions. In the judgment of this Court, the Attorney General's actions in the present case are virtually a classic example of this problem.

The Attorney General continues to suggest that the matter be certified for an interlocutory appeal under 28 U.S.C. § 1292(b) (1970). This section provides in pertinent part that a district court may certify for appeal an order not otherwise appealable if

> "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The Government seeks certification for appellate review of both the original May 31, 1977 order and the June 30, 1978 ruling with respect to the contempt sanction.

As to the May 31, 1977 order, in view of the opinion of the Court of Appeals already rendered, there is simply no remaining question of law which could possibly be the basis for a certification. It should be noted that the Court of Appeals expressly stated that the type of procedure directed

by this Court -- in camera review of allegedly privileged documents with the assistance of opposing counsel -- was "well-established" as appropriate. In re United States, 565 F.2d 19, 23 (2d Cir. 1977), cert. denied, 46 U.S.L.W. 3766 (U.S. June 12, 1978). The Second Circuit relied on the recommendation of the Supreme Court with respect to such a procedure in United States v. Nixon, 418 U.S. 683, 715 n.21 (1974), and the approval of such a procedure in United States v. Anderson, 509 F.2d 724, 729 (9th Cir.), cert. denied, 420 U.S. 910 (1975). The latter case dealt with the question of informant confidentiality.

It is the judgment of the Court that there is no question of law newly presented by the Court's June 30, 1978 opinion as to which there is any "substantial ground for difference of opinion." Further, to certify for appeal the question of what sanction a court should impose in its sound discretion under Rule 37 to remedy a discovery violation would not "materially advance the ultimate termination of the litigation." To the contrary, such interlocutory appeals would produce only delay.

All applications for certification are denied.

So ordered.

Dated: New York, New York
July 6, 1978
12:45 P.M.

THOMAS P. GRIESA
U.S.D.J.

No. 78-1702

In the Supreme Court of the United States

OCTOBER TERM, 1978

SOCIALIST WORKERS PARTY, ET AL., PETITIONERS

v.

THE ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is not yet reported. Prior opinions of the court of appeals are reported at 565 F.2d 19 (Pet. App. 28a-38a) and 510 F.2d 253.[1] The principal relevant opinion of the district court (Pet. App. 39a-82a) is

[1] A stay of this decision was denied. 419 U.S. 1314 (1974) (Marshall, Circuit Justice).

reported at 458 F. Supp. 895. The opinion reviewed by the court of appeals (Pet. App. 107a-111a) is reported at 458 F. Supp. 923. Prior opinion of the district court is reported at 387 F. Supp. 747. A related opinion of the district court is reported at 463 F. Supp. 515. Additional opinions of the district court (Pet. App. 83a-111a) are not reported. Other opinions of the district court are neither reported nor reproduced in the petition.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on April 13, 1979. The petition for a writ of certiorari was filed on May 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in vacating the district court's order holding the Attorney General in contempt for declining to produce certain materials during discovery.

STATEMENT

1. Petitioners — the Socialist Workers Party (SWP), the Young Socialist Alliance (YSA), and several of their members—began this action in 1973. Their second amended complaint, alleging numerous abuses arising from the FBI's investigations of the Party over several decades, seeks injunctive relief and some $40 million in compensatory and punitive damages against the United States and various federal

officials. The case has not gone to trial, and the principal disputes to date have concerned the status and identity of informants who have given information concerning petitioners to the FBI.

In the district court petitioners received extensive discovery by means of interrogatories, depositions and the production of approximately seventy thousand documents from government agencies. Pet. App. 29a. They then sought, in addition to these materials, the names of all persons who have on at least two occasions furnished information on the SWP to the FBI. There are approximately 1300 such persons, and petitioners "have insisted that they would be satisfied with nothing less than the names of all informants." *Ibid.* The government argued that its ability to gather information for law enforcement purposes would be severely damaged by the requested disclosure. *Ibid.*

2. On May 1, 1977, the district court ordered the FBI to disclose to four of petitioners' counsel [2] the names and files of 19 informants,[3] selected by petitioners on the basis of the FBI's answers to interrogatories. When the government indicated reluctance to comply with this directive, the district court

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[2] One of the four attorneys is a member of the SWP.

[3] There are now 18 files in dispute. The government voluntarily furnished petitioners with the files of seven informants whose identities previously had been disclosed. A further file, one of the 19 subject to the disclosure order, also was supplied when it became clear that the identity of that informant had become public. Pet. App. 4a.

threatened to hold the Attorney General in contempt. The Attorney General then appealed and sought mandamus, seeking to avoid citation for contempt of court.

Despite recognizing that "some other circuits have taken a more liberal position with regard to the reviewability of interlocutory orders of the type involved herein," the court of appeals found itself "bound to follow [its] strong policy against review." Pet. App. 37a-38a. The court of appeals therefore dismissed the appeal and denied the petition for mandamus. In doing so, however, it pointed out that the identities of informants are presumptively privileged, that "[d]isclosure should not be directed simply to permit a fishing expedition * * * or to gratify the moving party's curiosity or vengeance," and that it was "far from convinced that plaintiffs' attorneys require a wholesale disclosure of informants' identities in order to prepare their case for trial." *Id.* at 33a-34a. Indeed, the court wrote, "[t]he activities of the informants have been extensively disclosed in the discovery already had, and most of the other proof necessary to establish plaintiffs' claim is already in plaintiffs' possession." *Id.* at 37a.

The court also observed that jurisdictional bars to petitioners' action might obviate the need for further discovery:

> Defendants argue forcibly that plaintiffs have no valid cause of action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.*, or the Constitution and rely in addition upon the two year statute of limitation contained in 28 U.S.C. § 2401(b) as a valid defense. These issues are not now before us but will be determined by the district court on the trial.

Pet. App. 36a. The court stated that "the identification of informants, once made, will be irreversible on an appeal from the final judgment" (*ibid.*) and that "a decision as to the need for discovery of much privileged matter can be deferred safely until more fundamental issues, perhaps dispositive of the need, are decided on trial." *Id.* at 37a. Accordingly, the court expressed its hope "that the district judge will give full consideration to the thoughts here expressed." *Id.* at 38a. This Court denied the Attorney General's petition for certiorari. 436 U.S. 962 (1978).

Before this Court denied the petition, the district court renewed its insistence on the disclosure of the 18 files and warned again (Feb. 22, 1978 Tr. 27-28) that it would "seriously consider contempt or imprisonment of defiant officials" in the event of noncompliance. The day after this Court denied the petition, the Attorney General filed with the district court an affidavit respectfully declining to comply with the disclosure order on the ground that compliance would have a significantly detrimental effect on the government's law enforcement and counterintelligence efforts and would change the longstanding policy of the United States concerning the protection of informants.[4] The Attorney General explained that

[4] We attach a copy of the Attorney General's affidavit as Appendix A to this brief.

his obligation to protect the legitimate interests of the United States required him to obtain full appellate review of the disclosure order, even though that meant accepting sanctions under Fed. R. Civ. P. 37(b). The affidavit requested the district court to certify its order for appellate review pursuant to 28 U.S.C. 1292(b); it also suggested use of the sanctions, other than contempt, set forth in Rule 37(b)(2)(A)-(C)—*i.e.*, "concessions of certain facts or legal issues, or partial judgment in plaintiffs' favor." [5]

On June 30, 1978, the district court issued an opinion rejecting alternative sanctions and stating that continued noncompliance would result in a contempt citation against the Attorney General (Pet. App. 39a-82a). On July 6, 1978, after the Attorney General again declined to produce the files, the district court adjudged him in contempt (Pet. App. 107a-111a). On July 7, 1978, the court of appeals stayed this order pending appeal.[6]

[5] The government suggested three options: (1) that petitioners be allowed to establish from facts within their knowledge the amount of damages suffered by each SWP and YSA chapter and be given the benefit of a presumption that the damages were the result of informant activity; (2) that petitioners go forward with full discovery on the basis of the 12 informant files (the eight previously released, and an additional four that the government volunteed to release after obtaining the informants' consent) available to them and present the court with a "test case" of injury and damages, so that the court could determine more selectively which information in the files was necessary to determine the amount of actual damages; and (3) that, if neither of these alternatives was acceptable, the court and counsel should devise some other issue-related sanction (App. A, *infra*, 10a-12a; see also Pet. App. 16a).

Although the court of appeals held that the contempt adjudication is not appealable, it granted the petition for a writ of mandamus, vacated the contempt order, and directed the district court to consider issue-related sanctions under Rule 37(b). The court found the case to be of "extraordinary significance" because of the unprecedented nature and scope of petitioners' underlying arguments, the unprecedented number of informants potentially involved, and "the seriousness of a contempt citation against the Attorney General." Pet. App. 11a, 13a. The court recognized that, although mandamus is not always appropriate to review a contempt citation, that action "has greater public importance, with separation of power overtones, and warrants more sensitive judicial scrutiny [when imposed on the Attorney General] than such a sanction imposed on an ordinary litigant." *Id.* at 12a.

The court declined to review the underlying disclosure order, but it concluded that the district court committed clear error in determining that contempt was the only appropriate sanction for noncompliance. It explained:

[6] Petitioners have not reproduced this opinion. We reprint it as App. B, *infra*, 13a-24a for the Court's convenience.

> [H]olding the Attorney General of the United States in contempt to ensure compliance with a court order should be a last resort, to be undertaken only after all other means to achieve the ends legitimately sought by the court have been exhausted.

Pet. App. 14a. The court of appeals rejected the district court's view that the files are "so central to the [petitioners'] case" that a citation for contempt is the only possible sanction. *Id.* at 17a. The court instructed the district court to produce for petitioners a set of "representative findings" from the informant files, designed to supply petitioners with "much of the information that they need to establish their claims or to propose other sensible sanctions, if any are needed without compromising the identity of the informants." *Id.* at 18a.

ARGUMENT

1. Petitioners' principal contention is that the court of appeals should not have reviewed the district court's order holding the Attorney General in contempt of court. According to petitioners, the decision violates the policy of avoiding piecemeal appellate review.

We do not quarrel with the general policy petitioners invoke. Indeed, both we and the Second Circuit honor that policy. See *United Artists Corp.* v. *United States*, No. 78-1772, cert. denied (June 18, 1979) (the Second Circuit dismissed an appeal from an order declining to quash a subpoena; our brief in opposition relied on the general rule that discovery

orders are not appealable). But it has long been accepted that, although orders concerning discovery are not appealable, a party may obtain review by refusing to comply, being held in contempt, and appealing from that decision. See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530, 532 (1971); *Alexander* v. *United States*, 201 U.S. 117, 121 (1906); *Schleper* v. *Ford Motor Co.*, 585 F.2d 1367 (8th Cir. 1978). Such appeals pose some potential for delay of ongoing proceedings, but they are appropriate because they involve the contempt citation itself, not simply the discovery. The citation is a "final decision" under 28 U.S.C. 1291. And there is a built-in safeguard against appeals for the purpose of delay: although it is easy to appeal from a discovery order, no party can be sanguine about accepting a contempt adjudication in order to obtain appellate review. The party takes the risk that he is wrong and that the citation will be affirmed. This prospect confines appellate attention to the most serious cases in which a party most strongly believes that the district court has erred.

The Second Circuit stands alone in holding that a party cannot appeal as of right from a contempt adjudication. No court is more favorable in this regard to petitioners. The Second Circuit's issuance of mandamus in this case, far from creating a departure from accepted practice, simply achieved through a discretionary writ what any other court of appeals would have allowed by appeal. There is, consequently, no conflict among the courts of ap-

peals concerning the result in this case; every court would grant the Attorney General some form of review in a case such as this one.[7]

Moreover, the court of appeals' use of mandamus was appropriate under the principles governing the use of that writ. Mandamus is appropriate to control the discovery process in an "extraordinary situation." *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976). Issuance of the writ in such cases lies largely in the discretion of the court of appeals. *Id.* at 403.[8] Whether that discretion was

[7] Indeed, as we argued in our petition for a writ of certiorari after the court of appeals declined to grant relief on the previous appeal (No. 77-1419, October Term 1977), we believe that the Attorney General is entitled to appellate review before being held in contempt. In this respect, the Attorney General is more like the President than like an ordinary litigant. See *United States* v. *Nixon*, 418 U.S. 683, 690-692 (1974). At least two courts of appeals would have granted review to the Attorney General without the need for a contempt citation. See *Usery* v. *Ritter*, 547 F.2d 528 (10th Cir. 1977); *United States* v. *Hemphill*, 369 F.2d 539 (4th Cir. 1966). If the Court should grant the petition in this case, we would urge this approach to appellate jurisdiction as an alternative ground for sustaining the court of appeals' judgment.

[8] *Kerr* cited with apparent approval a number of appellate cases issuing mandamus to control discovery in extraordinary situations. See, *e.g.*, *United States Board of Parole* v. *Merhige*, 487 F.2d 25 (4th Cir. 1973), cert. denied, 417 U.S. 918 (1974), cited at 426 U.S. at 405 n.8. Appellate decisions after *Kerr* continue to make use of mandamus when the situation demands. See, *e.g.*, *Iowa Beef Processors, Inc.* v. *Bagley*, No. 78-1855 (8th Cir. Feb. 7, 1979), cert. denied, No. 78-1281 (Apr. 16, 1979); *In re Halkin*, No. 77-1313 (D.C. Cir. Jan. 19, 1979).

abused is a fact-bound matter that need not be reviewed by this Court. And the discretion was not abused here.

As both Judge Gurfein (App. B, *infra*, 18a-23a) and the court of appeals (Pet. App. 9a-13a) pointed out, this is a unique case. Never before has an Attorney General been held in contempt of court. The citation for contempt placed the Executive and Judicial Branches in direct conflict; prompt appellate resolution of that conflict surely was in the public interest. Cf. *United States* v. *Nixon*, 418 U.S. 683, 690-692 (1974). Moreover, the Attorney General personally determined that the disclosure of the informants' identities would have a significantly detrimental effect on law enforcement (App. A, *infra*, 3a). He therefore declined to comply with the order for the express purpose of obtaining appellate review (*id.* at 7a-9a), because compliance with the order would disclose the information and make appellate review at some later time useless. See *Maness* v. *Meyers*, 419 U.S. 449, 460 (1975); see also Pet. App. 36a. As the court of appeals held, the district court committed a clear error in holding that sanctions other than contempt were not adequate. If there ever is a case in which review by mandamus is appropriate, this is that case.

2. Petitioners' further attack on the court of appeals' disposition of the sanctions issue does not require review by this Court. The selection of sanctions is committed to the district court's discretion in the first instance, reviewable by the court of ap-

peals for abuse of discretion. *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). The court of appeals applied that established rule to the particular circumstances of this case.

The court of appeals' disposition of the case is justified by several considerations. First, the Attorney General offered to accept an adverse judgment as the sanction for noncompliance (App. A, *infra*, 11a-12a). The entry of a judgment is an accepted means of testing a claim of governmental privilege.[9] A party always should be free to decide that the discovery sought by the plaintiff is worse than the relief on the merits. The object of a suit is the relief, not the discovery. If, for example, it would cost the defendant $10,000 to respond to the interrogatories filed in a suit seeking recovery of $100, the defendant always should be free to tender the $100 and rid himself of the discovery. The plaintiff should not be able to increase the stakes of a case, beyond the amount of his injury, by imposing an intolerable burden of discovery on the defendant. Yet, the Attorney General concluded, that is essentially what happened here: petitioners sought to impose on the government something (the disclosure of informants' identities) more harmful to the government than the monetary and injunctive relief sought in the complaint. The Attorney General, as attorney for the government, decided that he would

[9] That is how the privilege issue reached this Court in *United States* v. *Reynolds*, 345 U.S. 1 (1953).

accept a loss of the case (if need be) rather than provide the names. That decision should have been respected.

Second, as the court of appeals held, even the remedy of the entry of judgment for petitioners would have been needlessly severe. Rule 37 allows only "just" sanctions. A sanction is not "just" if some less severe one will do as well. And where, as here, the disobedience to the order is explained by a good faith belief that the order is harmful to the public interest (as well as by a good faith attempt to obtain appellate review), the district court has an obligation to select the least drastic adequate sanction. *Societe Internationale* v. *Rogers*, 357 U.S. 197, 212 (1958). We rely in this respect on the court of appeals' detailed explanation of why sanctions less severe than adverse judgment or contempt are feasible here (see Pet. App. 16a-19a). Other cases also permit the government to accept issue-related sanctions. See, *e.g.*, *Black* v. *Sheraton Corp.*, 564 F.2d 531 (D.C. Cir. 1977); *Smith* v. *Schlesinger*, 513 F.2d 462 (D.C. Cir. 1975); *Bank Line* v. *United States*, 163 F.2d 133, 137 (2d Cir. 1947).[10]

3. The court of appeals' disposition of this case is especially appropriate because there are infirmities in the underlying discovery order. This Court has

[10] Petitioners' reliance on *Sawyer* v. *Dollar*, 190 F.2d 623 (D.C. Cir. 1951), vacated as moot, 344 U.S. 806 (1952), is not warranted. *Sawyer* involved the government's failure to comply with a final decision on the merits, not an attempt to obtain appellate review of a claim of privilege in the discovery process.

held that the use of informants is essential to law enforcement, and that their identities should not be revealed without strong reasons. Even in a criminal case, the identities of informants should be revealed only when that is "essential to a fair determination of a cause." *Roviaro* v. *United States*, 353 U.S. 53, 61 (1975); see also *Weatherford* v. *Bursey*, 429 U.S. 545, 557 (1977). The privilege is stronger still in civil cases. See Pet. App. 33a (collecting cases).

In this case, the Attorney General has personally attested to the "significantly detrimental effect" of disclosure on the government's law enforcement and counterintelligence operations (App. A, *infra*, 3a). The district judge stated that he was "reasonably convinced that the *identity* of the [informants] in all, virtually all, cases would be almost useless to [him] as a judge or to the parties to the litigation." Pet. App. 20a (emphasis supplied). The identity of informants is not important to petitioners because the government has conceded that it used approximately 1300 informants over the periods in question, and "most of the other proof necessary to establish [petitioners'] claim is already in [petitioners'] possession." *Id.* at 37a. The nature and extent of the informants' activities also have been disclosed. Any further information that petitioners may need could be obtained under the procedure of "representative findings" proposed by the court of appeals, "without disclosing the identity of the informant." *Id.* at 19a. And there is no conceivable basis for the district court's holding (*id.* at 77a) that further discovery is necessary to shape

injunctive relief: even if the government's voluntary cessation of surveillance does not moot this part of the case, injunctive relief would simply be directed against future improprieties, and there is no need for petitioners to know the details of past ones.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1979

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[11] Petitioners' situation thus is quite unlike that of the plaintiffs in *Hampton* v. *Hanrahan*, No. 77-1698 (7th Cir. Apr. 23, 1979), pet. for rehearing pending, which petitioners contend is in "essential conflict" (Pet. 21) with the court of appeals' decision here. *Hampton* involved, among other things, a claim of unconstitutional search and seizure. The defendants relied on a warrant authorizing the search. The validity of the search warrant—and thus the existence of the plaintiffs' Fourth Amendment claim—hinged on the reliability of a particular alleged informant. Because the record indicated that there was considerable doubt about the informant's reliability—or, indeed, his very existence—the Seventh Circuit held that the plaintiffs' need for the information overrode the privilege (slip op. 61-62, 67). Cf. *Franks* v. *Delaware*, 438 U.S. 154 (1978). There is no such "serious factual controversy focusing on the existence or identity" (slip op. 67) of informants here. Indeed, in a more recent case in which the need for the identity of informants was less clear, the Seventh Circuit sustained a claim of privilege, citing the instant case with approval. *American Civil Liberties Union* v. *Brown*, No. 78-1906 (7th Cir. June 7, 1979), slip op. 6-7.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 3160 (TPG)

SOCIALIST WORKERS PARTY, *et al.*, PLAINTIFFS,

— *v* —

ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,
DEFENDANTS.

AFFIDAVIT OF GRIFFIN B. BELL

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss.:

GRIFFIN B. BELL, being duly sworn, deposes and says that:

1. I am the Attorney General of the United States. I make this affidavit in accordance with my responsibilities under the Constitution and laws of the United States and in response to the order of this Court directing disclosure of the files, and thereby the identities, of eighteen informants to four attorneys who represent plaintiffs in this case. Each file contains the name of the informant who is the subject of the file as well as many factual details identifying that informant.

2. I have personally reviewed this matter, including portions of the informant file summaries examined by the Court and the passages of transcript

which I understand constitute the Court's explanation of the basis of this disclosure order. I make this affidavit based on personal knowledge and on information and belief. The sources of my information and the bases of my belief are statements and documents furnished me by other government officials in the course of their official duties. I have also received the recommendations of the Solicitor General, the Associate Attorney General, the Assistant Attorney General in charge of the Civil Division of the Department of Justice, the United States Attorney for the Southern District of New York, and the Associate Director of the Federal Bureau of Investigation. The Director of the Federal Bureau of Investigation has recused himself from acting in this matter because, prior to his appointment as Director, he sat as a member of the panel of the Court of Appeals for the Second Circuit which heard a petition for mandamus in this case.

3. The United States has a vital interest in maintaining the confidentiality of the names of informants who provide information to government authorities. Information received from informants has led to the apprehension and conviction of many criminals and has also been of major value in foreign counterintelligence matters. The continued flow of information from informants to authorities rests on the confidence of informants that their identities will not be revealed unless they consent to such revelation. The important governmental interest in the confidentiality of informants' identities led to the establish-

ment in our law of the informant privilege which has been recognized in many cases including the Court of Appeals' opinion in this case. *See* 565 F.2d at 22. The scope of the informant privilege has been litigated most frequently in criminal cases, in which the Government retained the option voluntarily to withdraw the charges if the court ordered disclosure of the identity of an informant who declined to consent to such disclosure. In civil cases as well, however, the Government has been prepared to submit to appropriate sanctions under Rule 37 of the Federal Rules of Civil Procedure rather than disclose informants' identities. *See Usery* v. *Ritter*, 547 F.2d 528 (10th Cir. 1977); *United States* v. *Hemphill*, 369 F.2d 539 (4th Cir. 1966).

4. The informant privilege is fully applicable to the eighteen files which are the subject of this Court's order. This conclusion has also been accepted by the Court of Appeals for the Second Circuit. *See* 565 F.2d at 22.

5. Releasing these eighteen files to plaintiffs' counsel would have a significantly detrimental effect on law enforcement by undermining the pledge of confidentiality which the FBI makes to informants, which pledge its agents made in this case. Such action would signal to other informants and potential informants that the United States would not or could not continue to honor the pledge of confidentiality which has been the cornerstone of its relationship with informants, thereby adversely affecting the ability of other law enforcement agencies, such as

the Internal Revenue Service, the Drug Enforcement Administration, the Secret Service, the Postal Inspection Service, the Bureau of Alcohol, Tobacco and Firearms, the Immigration and Naturalization Service, the Securities and Exchange Commission and the Department of Labor, to attract and maintain sources of information. Release of these names here and in other cases under similar circumstances would also tend to deter potential and actual foreign counterintelligence informants from cooperating with the United States. The resulting diminution of information and the effect on law enforcement and foreign counterintelligence would, in my judgment, be substantial.

6. The Government is a party to many cases in which issues are raised relating to privileged information. Such cases include several cases similar to this case as well as many cases brought under the Freedom of Information Act. In such cases District Judges might well expect the Government to follow any procedure accepted here. The result would be that this procedure of furnishing opposing counsel with informants' identities could easily become the routine first step in the litigation of governmental privileges.

7. If the long standing policy of the United States concerning the protection of informants is to be changed, such changes should operate prospectively and should be directed, I believe, by the legislative or the executive branch of government, rather than as a retroactive by-product of Government compli-

ance with this Court's discovery order. In this regard Executive Order 12036 (Jan. 24, 1978) on foreign intelligence activities, the Attorney General's Guidelines on Use of Informants in Domestic Security, Organized Crime and Other Criminal Investigations, dated December 15, 1976, and the Attorney General's Guidelines on Domestic Security Investigations, dated April 5, 1976, have attempted to codify, clarify and modernize our policy in this area. The United States Senate and House of Representatives have devoted substantial effort to an examination of past and current practices concerning the Government's use of informants as well as to the question whether legislative reform is needed.

8. The Court has noted a "serious question as to whether the bulk of those FBI activities [use of informants in the investigation of plaintiffs] had any valid law enforcement purpose" and has noted that these particular informants did not report any unlawful activities by the plaintiff organizations. The Court has also referred to the fact that this investigation has been terminated. Acceptance of such factors as reasons for disclosure would undermine any informant's expectation of confidentiality because at the beginning of an investigation, when the informant must decide whether to cooperate with the government, it is impossible for the informant to be sure whether that informant, another informant or another investigative technique will discover any criminal activity or a threat to national security, and whether, if so, the appropriate officials will de-

cide to prosecute the case. Indeed, many cases are not brought because the government officials know that prosecuting the case would require revelation of informants who will not consent to such disclosure or whose value as continuing sources of information outweighs the value of a particular prosecution. A policy of revealing informants in discontinued investigations would also undermine the reliability of informant information since it would provide informants with an incentive to report inaccurately in order to preserve their anonymity. It would also discourage government officials from terminating investigations which had become of marginal utility. Such a policy would also be unfair to informants who had participated in an investigation based on a pledge of confidentiality only to have the government renege on its promise because of some retroactive finding that the investigation was unnecessary or unjustified for reasons entirely outside the informant's control.

9. The Court has also observed that "there may be a variety of tortious acts which were committed by the FBI, including trespass and conversion of property. The latter refers to the removal of private documents for production to the FBI. The FBI and certain informants may have engaged in activities designed to intentionally destroy certain chapters of the SWP and YSA." (May 31, 1977 at 15-16). Surely this observation constitutes no basis for a blanket release of eighteen identities, including those of informants whose files contain no suggestion that they were involved in any such conduct, prior to de-

ciding the jurisdictional and other legal issues relating to these claims.

10. The Court has also referred to a supposed distinction between these informants and those engaged in other types of investigations. The Government simply cannot acquiesce in a retroactive decision by the District Court to accord national security informants' identities less protection than that provided other informants.

11. The fact that the Court's order would release these files and identities only to plaintiffs' attorneys does not provide adequate protection to the important Government interests here. Informants rely for the security of their identities on the commitment and ability of government agencies and officials, not on attorneys who may in the future come to represent the target of the investigation. In my judgment the procedure embodied in the Court's order would create a significant danger of purposeful or inadvertent release of identities to unauthorized persons. The Court of Appeals has specifically questioned this Court's conclusion to the contrary. 565 F.2d at 24 n.

12. The Government has been unable to obtain appellate review of the merits of this Court's disclosure order. Although the Court of Appeals for the Second Circuit expressed its concern "that the course upon which the District judge has embarked will lead to disclosure for which there is no substantial need . . . and to unnecessary rummaging in government files" 565 F.2d at 23, it concluded that this Court's order is unreviewable at this stage of the

case. The Supreme Court denied the Government's petition for certiorari seeking review of the question whether appellate review of this disclosure order may be obtained through any procedure other than the Government's declining to comply with the order. In addition, this Court has deferred or decided only tentatively certain legal issues critical to the sufficiency of plaintiffs' claims attacking informants. Consequently those issues as well as others determinative of this Court's jurisdiction to entertain such claims have never been subjected to appellate review either by the Court of Appeals or the Supreme Court. This Court has declined to certify these issues as well as the correctness of this disclosure order for appeal pursuant to 28 U.S.C. § 1292(b). Instead, this Court has offered the Government a proposal by which the number of identities to be disclosed would be reduced from eighteen names to nine names if the Government would agree to forfeit its right to appeal the correctness of the disclosure decision.

13. Under these circumstances, the only way for the Government to obtain full appellate review of this Court's order, which I believe to be erroneous and about which the Court of Appeals for the Second Circuit expressed grave reservations, is to decline to comply with the order and accept sanctions under Rule 37 of the Federal Rules of Civil Procedure. The Government could then take an appeal from whatever final judgment this Court imposes. Compliance with this Court's order that the eighteen names be disclosed would render the issue moot since

the names would no longer be confidential, thus depriving the Government of its right of appeal.

14. I have the utmost respect for this Court. This procedure, obtaining appellate review on the merits by accepting sanctions under Rule 37, does not constitute definance of a court order. It is a recognized procedure invoked from time to time by the Government in order to protect privileged information. Accepting sanctions to preserve the Government's right to full appellate review is in furtherance of my respect for the law. My only alternative is to authorize action which would sacrifice important Government interests on the basis of an order which may be declared erroneous whenever full appellate review can be obtained.

15. I authorize release to plaintiffs and their counsel of the files and identities of of four informants, designated 6, 220, 1123, and 1321, under an appropriate protective order limiting use of this material to proper purposes in this litigation, with the names of other informants and matters not related to plaintiffs deleted. These four informants have consented to the release of their identities for this purpose. This release would give plaintiffs access to a total of twelve informant files, these four plus eight files previously released because of various circumstances not here relevant.

16. I respectfully decline to authorize release of fourteen of the eighteen files. These files include the nine files which this Court has found are not essential to plaintiffs' preparation and trial of their case, num-

bers 73, 162, 176, 317, 675, 1007, 1121, 1211, and 1350. They also include the identities of five other informants who have declined to consent to release of their identities. They are numbers 53, 148, 306, 311 and 616.

17. I believe that the proper course concerning these fourteen informants is for this Court to certify for appellate review, pursuant to 28 U.S.C. § 1292 (b), the question whether this Court's order directing such disclosure, prior to a decision of the fundamental legal issues involved, is correct. The Court should also decide and certify these fundamental legal issues. Alternatively, I believe that the Court should proceed to a trial of the case on plaintiffs' claims unrelated to informant activities, along with their claims related to the twelve informant files to which they would have access. The Government would stipulate to or concede many facts concerning its use of informants in the investigation to the extent such action would not compromise informants' identities. Plaintiffs could also present whatever proof they now have or could obtain concerning how informants damaged them. The Court might also find that *ex parte* questioning of an informant or contact agent by either the Court or a Magistrate might be helpful. In short, the Government is willing to participate in any reasonable procedure which does not compromise the security of the identities of informants who do not consent to the release of their names. After this trial, the Court could take up the question whether sanctions pursuant to Rule 37 are appropriate and,

if so, what sanctions are proper. By this final stage of the case, the Court would have decided many threshold legal issues determinative of the Court's jurisdiction to entertain plaintiffs' informant claims and whether plaintiffs' allegations constitute a cause of action. A decision in the Government's favor on any of several such issues would eliminate many, if not all, the informant problems in the case. This procedure was suggested by the Court of Appeals which said "In this case, which will probably be tried without a jury, . . . a decision as to the need for discovery of much privileged matter can be deferred safely until more fundamental issues, perhaps disposition of the need, are decided on trial." 565 F.2d at 24 (citations omitted) Either of these courses, certification or trial, would allow the Government to obtain full appellate review. In my opinion, these approaches constitute viable accommodations between the Government's interests in confidentiality of informants' identities and whatever legitimate claims plaintiffs may have.

18. The necessity for the Government to take sanctions in order to preserve the right to appeal is avoided if this Court grants certification pursuant to § 1292(b). If this Court adheres to its denial of certification, requiring the Government to submit to sanctions in order to preserve its right to appellate review, I believe that appropriate sanctions would be the sanctions set forth in Rule 37(b)(2)(A)-(C), consisting to concessions of certain facts or legal issues, or partial judgment in plaintiffs' favor. The

correctness of the Court's disclosure order including the underlying legal issues, as well as the propriety of the sanctions, could then be the subject of a full review on appeal from any final judgment.

19. In my opinion, contempt is not an appropriate sanction in this matter. This is not a decision which FBI officials, any other Government officials, or I have made in a spirit of defiance of court orders or out of a contemptuous attitude toward this Court or its authority. Rather, I make this decision, as stated, for this Court's authority, and based on my assessment of my duty as Attorney General to protect the legitimate interests of the United States.

WHEREFORE, concluding that the eighteen files and identities herein are privileged, and waiving that privilege with respect to four of said files and identities, subject to the limitations set forth in Paragraph 15 above, I must respectfully decline to release fourteen of the informants' files and identities.

/s/ Griffin B. Bell
GRIFFIN B. BELL
Attorney General

Sworn to before me this 13th day of June, 1978.

/s/ Audrey J. Williams
AUDREY J. WILLIAMS

My Commission Expires March 14, 1979.

APPENDIX B

[No Caption]

(Decision of the Court.)

JUDGE GURFEIN: As I indicated earlier, I have had a chance to read the briefs of both parties and study the cases that they have cited. The reason I am delivering an oral opinion is that there is a legitimate public interest in this case because it involves a sharp conflict between the civil rights of a political party which allegedly has been harmed by a series of allegedly illegal excursions by the FBI, and at the same time the government has a great interest in protecting its informants against unnecessary disclosure.

This case, in a sense, is an historic confrontation, for the government until recent years has rarely been a party to a suit charging a violation of constitutional rights.

In this case we have listened to the history, as it was given by both sides, of the proceedings thus far in the District Court. There was an order, generally speaking, to the FBI to furnish 18 files of informants to the Court for an in camera inspection, with the participation of the attorneys for the plaintiffs, as well as the attorneys for the defendants.

Those 18 files, as Judge Griesa indicated, might, but probably would not, involve the similar disclosure of up to 1,300 informants' files which the FBI had.

Without going into the details of the thrust and counterthrust of what the parties said before the

District Court, suffice it to say that the order was appealed by the defendants to the Second Circuit, that is to this Court, and, as I read the decision of the Court in 565 Fed. 2d 19, all that the Court decided was that at that stage of the proceeding, with the only thing outstanding being an order to produce document, it was an interlocutory order, which is not appealable.

The Supreme Court denied certiorari, that is, denied review, three Justices dissenting from that denial. Since then, however, there has been another step in the case, and that is the decision of Judge Griesa on June 30 to hold the Attorney General of the United States, Judge Griffin Bell, in contempt of court, unless by today he provided the files ordered by the Judge to be produced, including the identity of the informants.

As I understand it, by a telephonic conference yesterday with the Judge, who is in California, in which Mr. Leonard Boudin, the chief counsel for the plaintiffs, participated together with Mr. Fiske, the United States Attorney, the Judge decided that since the Attorney General had manifested his intention not to comply, he was then and there, meaning yesterday, holding the Attorney General of the United States in contempt of court. So the case comes before me today with that as an actuality. The Attorney General of the United States is now in contempt of the District Court for the Southern District of New York.

The United States has filed an appeal to this Court, and what it seeks today is a stay, pending the determination of that appeal, of two things: one, the original order for disclosure; two, the actual contempt itself within the context of that order; and, further, the question of whether there are not other sanctions possible under Rule 37 of the Federal Rules of Civil Procedure, rather than a contempt citation, as such.

As I say, the case is of great public interest, and yet the issues involved are highly technical, even for members of the bar who are not particularly familiar with the federal practice. So I shall try to explain what it is about in as simple terms as I can muster.

The general rule in the Federal courts is that there is no appeal until a final judgment in a civil case. This rule goes back to the Act of 1789, the first Judiciary Act which the first Congress enacted, and it has been the rule ever since. The reason for it is not far to seek, and that is, if people could keep running up to the Court of Appeals all the time while proceedings are going on below, it would be easy for somebody so disposed to upset the proceedings that were ongoing at the time.

But this general rule of finality is sometimes abrogated. In the famous case of Cohen vs. The Beneficial Corporation, which is in 337 United States, the government said that in certain exceptional cases which were independent proceedings and which would not be merged in the final judgment and where it

might be too late for the appeal to have any beneficial effect, an interlocutory appeal might be allowed.

In this case we do not deal with a generality, however. We deal with a rather circumscribed type of procedure, and that is the procedure of contempt.

There are two kinds of contempt. One is a criminal contempt and the other is a civil contempt. The criminal contempt is actually a punishment for defying an order of a court and is imposed by way of fine or imprisonment, generally, to vindicate the dignity of the court. A civil contempt, on the other hand, is an adjudication of contempt or an order of contempt to compel the respondent either to testify or to produce documents. If he does, he purges himself of the contempt. He is only in contempt until he obeys, and that has led to the saying that in a civil contempt, he has the keys to the jail door in his own pocket.

There is no question in my mind here that this is not a criminal contempt adjudication against the Attorney General, but that it is clearly a civil contempt, an attempt to coerce him to obey the mandate of the District Court, and it is a contempt directed at Judge Griffin Bell as a person. There is no institution that is being coerced. It is the person of a flesh and blood human being, which is important in this case.

The ground of refusal by the Attorney General to obey the order of the District Court was that the government has what we call an informer's privilege. That is a privilege of ancient duration, going way

back to the English practice where it was recognized that law enforcement, the security of the crown, the security of the nation, requires the protection of certain types of informants who otherwise would be subjected to the risk of reprisal and who also might be induced not to cooperate in future cases.

The Supreme Court dealt with this subject in a rather well known case called Roviaro vs. The United States in 353 United States, and there the Court said that the informer's privilege is really the government's privilege. That was a criminal case, and, as I indicated in the colloquy, involved an informant who had actually been engaged in a narcotics transaction and where it was vital for the defendant to have his identity disclosed.

There is no doubt, however, as the Court recognized in Roviaro, that there is a serious conflict between the civil rights of citizens and the rights and privileges of the government in pursuing law enforcement and security in terms of the protection of its informants. So what we glean out of the Roviaro case is that it is not only relevancy that determines the matter, but also the essential need, as it was put, for the informant's disclosure.

I need hardly say again that I am not concerned with the merits here. It is not my function nor within my power. All I have to determine today is whether the finality rule so inhibits the government from an appeal that it makes such an appeal almost illegitimate.

It is true, as the argument was made by the able counsel for the Socialist Workers Party, Miss Winter,

that normally in a civil case, where an order of civil contempt is made against a party to that case, it is not an appealable order. On the other hand, it is equally clear that if a person who is not a party to the proceeding is ordered to produce or to give testimony and is held in contempt, he may appeal, although in some cases he may have to wait for an actual sanction to be imposed before he gets that right to appeal.

So the question in my mind is, is Attorney General Griffin Bell really a party to this proceeding?

We were informed in the Cohen vs. Beneficial case, which I mentioned, that practical rather than technical constructions should govern us on the issue of whether something is an appealable order.

It seems to me in this case that since the present Attorney General, Bell, was not involved at all in any of the alleged torts that were committed or the alleged violation of civil rights, he is really a nominal defendant, only in the most technical sense of the word. The suit is really against the United States and against various officials and agents of the United States.

In what respect, then, is the Attorney General Bell required to respond? The answer, it seems to me, is not because he is a custo n of records, as such, but because he is the lawyer for the United States who has given the advice, based apparently—surely, I should say—on his own good faith and belief that to turn over the informers' files as requested, as directed by Judge Griesa, would do incalculable harm

to the government of the United States; so that I consider him as a person who is asserting a legal claim on behalf of the United States, no different than the position that Mr. Robert B. Fiske, Jr., himself is in as the United States Attorney for the Southern District of New York.

If we treat Attorney General Bell as a person, as the chief attorney for the government, the Eighth Circuit Court of Appeals has recently held that a lawyer for a party is not a party in terms of the appealability of a civil contempt order. In that case, in re Murphy, which is found at 560 Fed. 2d, the lawyer involved in the contempt was a private lawyer for one of the parties in a civil action.

In this case we have the Attorney General, who is not only a lawyer, but also a representative of the President of the United States, for it is the United States that is being sued, and the Chief of the Executive Branch is, to be sure, the President.

I hasten to say that in the normal court proceeding, the government is entitled to no special privileges beyond that of the ordinary citizen, and that remains true. But when we discuss matters of institutional confrontation between the highest echelons of the Executive Branch and the Judiciary, even though it may not be a constitutional confrontation, we are talking in terms of the separation of powers and other fundamental considerations of our government as it is constituted.

The best analogy that I can find is to the situation that arose in connection with the so-called Nixon

tapes. In that caes, as you will all recall, Judge Sirica of the District Court for the District of Columbia ordered the President of the United States, Richard Nixon, to produce for in camera inspection the tapes which he had taken in the White House. The President appealed the order. Mind you, he had not yet been cited for contempt, although it was rather obvious that that would be the next step.

The Court of Appeals for the District of Columbia and ultimately the Supreme Court of the United States held that an appeal would lie, and the reason was given by the Supreme Court in 418 United States at 691 in the following language:

> "Here, too, the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court, merely to trigger the procedural mechanism for the review of the ruling, would be unseemly and would present an unnecessary occasion for constitutional confrontation between two branches of the government.
>
> "Similarly, a Federal judge should not be placed in the posture of issuing a citation to a President, simply in order to invoke review."

As I have indicated, of course, Judge Bell is not the President of the United States, but I think there is a close enough analogy as a matter of common sense to recognize that this is an exceptional case.

The issue is not whether ultimately the Attorney General may not be held in contempt. That is not before us. The issue is simply whether sufficient has gone forward in the District Court by the finding of contempt against the Attorney General to permit an appeal from that contempt order to be taken.

It is obvious in this case that it goes in a sense beyond the Nixon tapes because it deals with an informer's privilege. Here, as has been indicated, if the informer's identity is revealed and a court subsequently holds that that was error, it will be too late in any sense to repair what would then have been found to have been damage.

So it seems to me that there is enough precedent here to favor an appealability of Judge Griesa's contempt order in terms of the exceptional nature of the case, recognizing, as I do, that this is a very important case and that the issue of the civil rights of a political party which claims that it is a peaceful party, with no record of violence, is an important issue, ultimately to be decided in the proper forum.

Again, I repeat that I do not prejudge the merits in any sense. I decide simply that there is merit in Mr. Fiske's argument that the government has the right to appeal.

I also should add that although this is an order apparently ordering the Attorney General to deliver the files in the presence of Mr. Boudin, the chief counsel for plaintiffs, I should add that my present ruling is not a reflection of any kind on the lawyers involved, not on Mr. Boudin or on any of his staff.

The assumption is that they would obey the Court's order and keep their knowledge to themselves. I cannot be as sanguine, however, in believing that some further efforts would not be made to subpoena the informants whose identies were revealed.

Indeed, as the Court indicated in an earlier case, it is tough on a lawyer to have to face this responsibility of knowing the names of informants that he is under a court order not to disclose.

A valiant argument was indeed made by Miss Winter to the effect that this is not an organized crime case, and I agree. But the law is structured in such a way that one decision may serve as a precedent for another, and there is no doubt that until the appellate courts straighten out this entire question of informer's privilege, that it is perfectly true that giving up that privilege too easily may in certain cases result in assassination and death. We have seen that, unfortunately, even in this Circuit.

Indeed, it may well be that in terms of the public security, the divulging of names may in time destroy a counter-espionage activity that may be very important to security. That is, I am not assuming, as I indicated, that this is the case, but I simply state that in terms of the general possibilities and the importance of the issue presented.

In my own opinion, therefore, the matter is too delicate to foreclose appeallate review at this stage of the game. Everybody will be better off if there is appellate review. The plaintiffs, if they win, will have a solid base on which to proceed in their case;

if they lose we will have prevented an untimely spilling of the beans in a situation that does not require it and which is irreparable in its terms.

I note also that these alleged wrongful acts stem from the year 1938, forty years ago, and go on until the 1970's, I believe. So the claim of urgency, while not to be disregarded, must also be balanced by the importance of the issue involved.

In the meantime, as I have indicated, I believe that discovery should proceed in other ways, and I know that Judge Griesa and the lawyers are keen enough and ingenious enough to figure out ways of not letting the case stall in dead center while the appeal is being heard.

I repeat again, for the benefit of the plaintiffs' counsel, that I am not holding—for it is not within my province to do so, even if I wanted to—that an attorney General of the United States can never be held in contempt. I am simply saying that when he is held in contempt, as in this case, he ought to have a quick right of appeal.

As I have indicated, I will grant a stay of the order of contempt, together with such other orders for discovery as may be involved in the appeal, pending the argument of the appeal. At that time the United States may make a further request to the panel then sitting for an extension of the stay until a final decision is reached by the Court.

In view of the finding that I have made that this is an appealable order, in my judgment, and cer-

tainly sufficiently so to permit a stay to be entered, as I have done, I will not address the question of extraordinary writ of mandamus, which the government has sought in the event that I deny the stay.

If there is nothing further, the Court will stand in recess, and I will sign an order today.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 329411 12

IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1702

SOCIALIST WORKERS PARTY, ET AL.,

Petitioners,

—v.—

THE ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

PETITIONERS' REPLY MEMORANDUM

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In the

Supreme Court of the United States

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Socialist Workers Party, et al.,

Petitioners,

—v.—

The Attorney General of the United States, et al.,

Respondents.

PETITIONERS' REPLY MEMORANDUM

Respondents' contention that "it has long been accepted that" a party to on-going litigation may appeal from a civil contempt order and that "the Second Circuit stands alone in holding that a party cannot" do so (Br. in Opposition at 9) is false[1] and flies in the face of the Court's longstanding rule that a civil contempt order against a party litigant is interlocutory in nature and therefore not appealable. *See Fox* v. *Capital Co.*, 299 U.S. 105; *Doyle* v. *London Guarantee & Accident Co.*, 204 U.S. 599. Since the First Judiciary Act was passed in 1789,[2] both the Congress and the courts have repeatedly recognized that a final judgment is a necessary prerequisite to review by appeal. *See e.g., Kerr* v. *United States District Court*, 426

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[1] *See e.g., In re Murphy*, 560 F.2d 326, 332 n.10; *Fenton* v. *Walling*, 139 F.2d 608, 609 n.10, *cert. denied*, 321 U.S. 798; *Apex Hosiery Co.* v. *Leader*, 102 F.2d 702, 703 (3d Cir. 1939) (*per curiam*), *aff'd on other grounds* 310 U.S. 469.

[2] Sections 21, 22, 25 of the Act of September 24, 1789, 1 Stat. 73, 83-85.

U.S. 394, 402-403; *United States* v. *Ryan,* 402 U.S. 530, 532-533; *Cobbledick* v. *United States,* 309 U.S. 323, 324-325. The purpose of the finality requirement is to prevent piecemeal review which delays the principal litigation and overburdens the appellate courts. *See American Express Warehousing, Ltd.* v. *Transamerican Insurance Co.,* 380 F.2d 277, 280 (2d Cir. 1967).

Though courts have carved out several narrow exceptions to the final judgment rule, none are applicable to the case at bar. *See e.g., United States* v. *Ryan,* 402 U.S. at 532-533; *Cohen* v. *Beneficial Industrial Loan Corp.,* 377 U.S. 541; *Alexander* v. *United States,* 201 U.S. 117. The Second Circuit characterized the exceptions to the final judgment rule as being those situations "where the interlocutory nature of the order is no longer present" and offered the following examples: a civil contempt citation issued to a *non-party* or a civil contempt citation to a party where the main case is effectively terminated or where the contempt proceeding is the sole court action involved. *International Business Machines Corp.* v. *United States,* 493 F.2d 112, 115 n.1 (2d Cir. 1973). This Court has also recognized the distinction between civil and criminal contempt and held that only the latter is a final judgment which is subject to appeal. *Doyle* v. *London Guarantee & Accident Co.,* 204 U.S. at 604-605.

The three cases cited by the government in support of its argument to obtain review by appeal all fit neatly within the exceptions to the rule but are clearly inapposite in the instant case. None of the cases permitted appeal by a party to on-going litigation from a civil contempt order.

The first case cited in this connection, *United States* v. *Ryan,* concerned an appeal by a witness before a federal

grand jury seeking relief from the burden of producing documents pursuant to a subpoena *duces tecum.* While the Supreme Court denied the witness the right to appeal at that stage of the proceedings, the Court pointed out that a grand jury *witness* could appeal from a civil contempt adjudication. 402 U.S. at 532.

Ryan, however, in no way offends the policy underlying the final judgment rule. The evils attendant upon an interlocutory appeal are simply not present when there are no other pending court proceedings. Moreover, a grand jury witness might be denied any opportunity to obtain appellate review if an appeal was not allowed from a contempt citation. *See United States* v. *Ryan,* 402 U.S. at 532-522; *Cobbledick* v. *United States,* 309 U.S. at 324-325. By contrast, a party litigant is assured the right to appeal from an adverse final judgment. By delaying the right to appeal until final judgment, however, appellate courts are spared the necessity of reviewing judgments that are ultimately favorable to the party seeking appeal, or reviewing cases that are settled, and the principal suit is not burdened by appeals undertaken for purposes of harassment or delay.

The other two cases cited by the government concerned appeals by non-parties to the litigation. In *Alexander* v. *United States,* 201 U.S. 117, the Court denied the right of a non-party witness to appeal from a court order requiring him to testify and produce documents, overriding his assertion of a Fifth Amendment privilege. 201 U.S. at 122. While the Court acknowledged that the witness could appeal from a subsequent civil contempt adjudication, *ibid.,* it in no way suggested that a *party* held in civil contempt could appeal prior to final judgment. The Court's decision later in the same year in *Doyle* v. *London Guarantee &*

Accident Company specifically held that a party could not do so.

Schleper v. *Ford Motor Co.*, 585 F.2d 1367 (8th Cir. 1978) offers no more support to the respondent, for two reasons. First, *Schleper* was an appeal from a *criminal* contempt citation, which is, in and of itself, a final judgment from independent proceedings between the contemnor and the government as sovereign. *Schleper* v. *Ford Motor Co.*, 585 F.2d at 1371-1373. *Cf., Doyle* v. *London Guarantee Co.*, 204 U.S. at 605, citing *Re Christensen Engineering Co.*, 194 U.S. 324. Second, the contemnor in *Schleper* was not a party to the original suit, but was an attorney; accordingly appeal of his contempt citation did not delay the pending litigation.

The controlling significance of the distinction between parties and non-parties was reiterated by the Eighth Circuit in *In re Murphy*, 560 F.2d 326, 332 n.10 (8th Cir. 1977). *Cf., International Business Machines Corp.* v. *United States*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 979. In *Murphy* the court rejected the argument that the close relationship between a party and his attorney renders the attorney a *de facto* party and therefore the court permitted the attorney, as a non-party to the litigation, to present his appeal from a civil contempt order.

Schleper and *Murphy* lend no support to the Attorney General in this case because he does not appear in this matter in the posture of an attorney. The Attorney General is indisputably a party in interest in this matter. The complaint charges the Attorney General and his department with serious violations of the plaintiffs' constitutional rights. Equitable relief is sought, which, if granted, would run against the Attorney General. Extensive discovery

has been sought of and by the Attorney General as a party defendant. The Attorney General, by his affidavit (Br. in Opposition at 1a) acknowledges that he exercises ultimate responsibility for the files in question, not in his capacity as attorney for the government, but rather in his official capacity as head of the Department of Justice. Thus, the defendant Attorney General's decision not to turn over the files clearly was not the "advice" of a mere lawyer, but rather was the act of a senior executive official in ostensible furtherance of his duties.

In a final effort to justify its claim for appellate review, the government again raises the argument, squarely rejected by the court of appeals (7a-8a), that the Attorney General is entitled to appeal under the special exception to the final judgment rule recognized in *United States* v. *Nixon*, 418 U.S. 683, 691-692. *Nixon* is clearly distinguishable from the case at bar in two decisive respects.

First, the government's reliance on *Nixon* ignores the unique factors that the Supreme Court found in that case. The controlling consideration was the singular significance of the role of the Chief Executive in the American system of government. The President not only is the head of the Executive Department, he "is the Executive Department." *Mississippi* v. *Johnson*, 4 Wall. 475, 500; *cf., Myers* v. *United States*, 272 U.S. 52, 123. Moreover, it has been true since the earliest days of the Republic that neither cabinet nor sub-cabinet officials are embodied with the attributes of sovereignty associated with the Presidency and thus have not been accorded the judicial deference due the President. *See Marbury* v. *Madison*, 1 Cranch 137, 165; *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524, 610. In contrast, courts have expressly acknowledged that there is no impediment to holding a "high officer of state" in contempt for refusing to comply with a court order di-

recting the production of documents. *See Bank Line, Ltd.* v. *United States,* 163 F.2d 133, 137 (2d Cir. 1947); *see also, Sawyer* v. *Dollar,* 190 F.2d 623 (D.C. Cir. 1951), *vacated as moot,* 344 U.S. 806.

Second, it should be noted that in *Nixon* the President appeared as a third party witness, not a party defendant. As such, review would have been appropriate from an adjudication of contempt,[3] *see United States* v. *Ryan,* 402 U.S. at 532-533, but as the Supreme Court acknowledged, it would be "peculiarly inappropriate . . . (t)o require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling. . . ." *United States* v. *Nixon,* 418 U.S. at 691.

The Attorney General, as a party defendant, appears before this Court on a much different footing, because he is not entitled to review by appeal until a final judgment is rendered in this case. Thus an appeal at this juncture would not merely relieve the Attorney General of the necessity of placing himself in contempt. Rather, by allowing the Attorney General to forego the necessity of awaiting final judgment, the Court would deal a crippling blow to the final judgment rule, by permitting the govern-

[3] The government's contention that two courts of appeal would have granted the Attorney General the right of appellate review before he was held in contempt is misleading in this context, since both cases involved the issuance of a writ of mandamus and not review on appeal. *See Usery* v. *Ritter,* 547 F.2d 528 (10th Cir. 1977); *United States* v. *Hemphill,* 369 F.2d 539 (4th Cir. 1966). In both cases the writ of mandamus was issued because the courts of appeals found the underlying discovery order to have been clearly erroneous. *Usery* v. *Ritter,* 547 F.2d at 532; *United States* v. *Hemphill,* 369 F.2d at 543. By contrast, the Second Circuit, in an earlier decision, found the underlying discovery order in the instant case to have been within the discretion of the district court. 565 F.2d 19, 23 (Pet. at 35a-36a).

ment the privilege of piecemeal review and condoning a fourteen month long delay of this litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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